

1 CAUSE NO. W07-50318-M

ORIGINAL

2 COA NO.

3 THE STATE OF TEXAS * IN THE DISTRICT COURT
4 VS. * 194TH JUDICIAL DISTRICT
5 WESLEY LYNN RUIZ * DALLAS COUNTY, TEXAS

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10 REPORTER'S RECORD

11 WRIT HEARING

12 Volume 2 of 4 Volume(s)

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19 BE IT REMEMBERED THAT on this the 21st day of

20 September, A.D., 2011, the above-styled and -numbered

21 cause(s) came on for hearing before the HONORABLE ERNEST B.

22 WHITE, III, of the 194th Judicial District Court of Dallas

23 County, State of Texas, the following is a true and correct

24 transcription of the proceedings had, to-wit:

25 (Proceedings Reported by Computerized Machine Shorthand)

*Belinda G. Baraka, Official Court Reporter
214-653-5803*

1 A P P E A R A N C E S

2

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8 FOR THE STATE OF TEXAS

9

10

11 HON. LYDIA BRANDT
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13 FOR THE DEFENDANT

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*Belinda G. Baraka, Official Court Reporter
214-653-5803*

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21 *Belinda G. Baraka, Official Court Reporter*
22 *214-653-5803*

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*Belinda G. Baraka, Official Court Reporter
214-653-5803*

P R O C E E D I N G S

(September 21, 2011)

(Defendant present in the courtroom.)

4 THE COURT: This is Cause No. W07-50318, styled
5 the -- rather ex parte Wesley Lynn Ruiz.

6 Let the record reflect that both sides are present
7 and ready in the courtroom and that the appellant is in
8 the courtroom.

9 Either side wish to put anything on the record
10 prior to proceeding?

11 MS. SHIN: No. I think we have done everything,
12 right?

13 MS. BRANDT: I would like to put something on the
14 record.

THE COURT: Very well. You may proceed.

16 MS. BRANDT: Just to -- we had agreed as far as
17 the billing records that they would be admitted, so
18 that they have already been marked as an exhibit.

19 We also have a stipulation of facts as to what the
20 record shows. And if the D.A. wants to add any
21 clarification to it afterwards, these are salient facts
22 that came from the record. Since we only have a day
23 and a half to do this hearing, rather than running back
24 and forth, pulling a lot of paper out, we have agreed
25 to the facts. And they are Exhibit No. 2, I believe,

1 to the record.

2 Did you want to...

3 MS. SHIN: I am stipulating not to the truth of
4 those facts. I am stipulating as to what the record
5 shows. So those are excerpts from the record that I am
6 stipulating to. Also, we would like to invoke the
7 Rule. So if --

8 MS. BRANDT: Could I add one more thing. We had
9 originally 11 witnesses that we are going to call, the
10 eleventh witness is Mary Debt, who is seated to my
11 right, she has been excused, so she is going to stay in
12 the courtroom. So, yes, we would both like to invoke
13 the Rule.

14 THE COURT: When you mention excused, you are
15 referring to released from being a witness?

16 MS. BRANDT: Yes, Your Honor.

17 I don't see all of my witnesses here, someone had
18 told me that Mr. Parks had checked in with the bailiff.
19 And I also don't see my investigator here who I was
20 going to call, although I did mention to him that he
21 would be called toward the end.

22 THE COURT: If you could have the witnesses that
23 you anticipate calling that are present in the
24 courtroom, come up and I will swear them in.

25 MS. BRANDT: Okay. If we could have Mr. and Mrs.

1 ziegenhain, Kevin Brooks, Gilda Kessner and
2 Mr. Brauchle, Mr. Johnson.

MS. SHIN: Deputy Avenn might also be a witness.

4 MS. BRANDT: I don't know, Your Honor, I am not
5 calling him, so I don't know.

6 THE COURT: If I may have all the witnesses raise
7 their right hand.

(Witnesses were duly sworn.)

9 THE COURT: Very well. The Rule has been invoked.
10 Meaning that if you are a witness in this matter, you
11 must remain outside the courtroom while you are not
12 testifying. Additionally, you must not discuss your
13 testimony with any other witness.

MS. Brandt, who will be your first witness?

MS. BRANDT: Richard Ziegenhain.

16 THE WITNESS: Your Honor, can I be provided with a
17 copy of the agreement?

18 MS. BRANDT: The stipulation of fact has been
19 marked over by us. I don't know if you have a copy
20 machine or not. We had originally changed a fair
21 amount of stuff on here?

THE WITNESS: Well, what is the final exhibit.

MS. BRANDT: It's the one with the court reporter?

THE WITNESS: May I have excess to that?

THE COURT: Mr. Brauchle, if you may, can you take

1 that to my coordinator and we will have him make a
2 copy.

3 THE WITNESS: All right.

4 MS. BRANDT: If I may also, Your Honor, to give us
5 an outline of where we are going.

6 THE COURT: Very well.

7 MS. BRANDT: We have ineffective assistance of
8 counsel that are in dispute. Essentially there are
9 several areas that we are going to get into.

10 One has to do with the missing audio recording
11 portions of the encounter with Mr. Ruiz and Officer
12 Nix.

13 Another has to do with the presence of law
14 enforcement in the courtroom during the trial
15 proceedings.

16 A third has to do with explaining Officer Nix's
17 aberrant behavior, mental health records, testimony as
18 to that, or an absence of testimony as to that.

19 And finally and the fourth issue has to do with
20 the nomenclature of the weaponry that was referred to
21 during the trial.

22 And what I would like to do so we are all on the
23 same page, is start with the presence of law
24 enforcement in the courtroom.

25 THE COURT: Very well.

1 You may be seated, sir.

2 MS. BRANDT: Your Honor, I don't know what we do
3 here, in federal court I am required to stand when I do
4 anything.

5 THE COURT: You may be seated. Only time you are
6 required to stand is when you are addressing the Court.

7 MS. BRANDT: Thank you, Your Honor.

8 THE COURT: Certainly.

9 **RICHARD ZIEGENHAIN**

10 was called as a witness, and having been duly sworn by the
11 Court, testified under oath as follows:

12 DIRECT EXAMINATION

13 BY MS. BRANDT:

14 Q Could you state your full name for the record,
15 please.

16 A Richard Ziegenhain.

17 Q And could you tell me what your relation to
18 Mr. Ruiz is?

19 A I am his grandfather.

20 Q Can you hear me?

21 A Yes.

22 Q Were you down here at the courthouse during his
23 trial?

24 A Yes, ma'am.

25 Q And was there anytime during the trial that you

1 were present in the courtroom?

2 A No.

3 Q You were never present in the courtroom?

4 A I'm sorry, yes, during the -- yes.

5 Q And could you tell me when you were present in the
6 courtroom?

7 A In the sentencing phase.

8 Q And what was your observation -- how many days
9 were you present during the sentencing phase?

10 A Just one.

11 Q And what was your observation when you were in the
12 courtroom during the sentencing phase, what did you see?

13 A Just a lot of uniformed officers, both Dallas
14 Police and sheriff deputies.

15 Q Could you tell me where in the courtroom you saw
16 law enforcement?

17 A Behind us.

18 Q So you are seated, so that we get an orientation
19 on the record, who is to your right?

20 A The Judge.

21 Q Okay. And so we have a wall to your right also.
22 We have the gallery that is behind you?

23 A Yes.

24 Q And a wall behind you?

25 A Yes.

1 Q Okay. Go ahead. So tell me where you saw law
2 enforcement?

3 A In the wall behind us.

4 Q And where else?

5 A The wall to --

6 Q To your right?

7 A To my right, yes.

8 Q Okay.

9 A On the other side of the room in the row -- seats.

10 Q And how do you know they were law enforcement?

11 A By their uniforms and the insignias on the
12 uniform.

13 Q Did you see them wearing badges?

14 A Yes, ma'am.

15 Q And what else did they have on that you observed?

16 A Like patch on their arm, guns.

17 Q So you saw them with weapons?

18 A Yes, ma'am.

19 Q When you talked about law enforcement, did you say
20 they were standing along the wall?

21 A Yes, ma'am.

22 Q Okay. About how many Dallas Police Officers did
23 you see standing along the wall, do you recall?

24 A About ten to 15.

25 Q Along one wall?

1 A No, no, I'm sorry, across the back and to the
2 side.

3 Q So you are saying -- so the record is clear, are
4 you saying that at any one time in the courtroom, you
5 observed somewhere between ten to 15 Dallas Police Officers
6 in the courtroom?

7 A Yes, ma'am.

8 Q Okay. Let's talk about where they were located in
9 the courtroom. Along the right wall that you had just
10 identified, approximately how many law enforcements did you
11 see, if you recall?

12 A Maybe three.

13 Q And to the back wall?

14 A Five.

15 Q And the remainder of the ten to 15 of them, where
16 were they located?

17 A On the -- my left side.

18 Q So they were seated on the benches?

19 A Yes, ma'am, yes.

20 Q Okay. At what period of time did you see all
21 these police officers present, was it during testimony or
22 was it during the attorneys closing statements or when did
23 you observe them in the courtroom?

24 A Ah, well, at the end right at the beginning of the
25 sentencing phase.

1 Q When you were seated in the -- watching the
2 testimony?

3 A Yes, ma'am, the last day of it.

4 Q So during that, the time that you were observing
5 the testimony is when you saw as many as between ten and 15
6 law enforcement present?

7 A Yes, ma'am.

8 Q Did you see what is called the closing arguments
9 of the attorneys, do you know what that is?

10 A Ah, yes, I did.

11 Q Okay. And do you recall how many Dallas Police
12 Officers were in the courtroom at the time that they made
13 their closing arguments, were there more than the ten to 15
14 or that's the total number that you remember?

15 A That's the number that I remember.

16 MS. BRANDT: I have no further questions.

17 THE COURT: Your witness.

18 CROSS-EXAMINATION

19 BY MS. DEAN:

20 Q Ms. Ziegenhain my name is Christi Dean. I
21 represent the State of Texas, with Grace Shin. We have
22 never met before?

23 A No, ma'am.

24 Q I want to ask you a couple of questions about the
25 testimony you just indicated and a copy of the affidavit you

1 provided to Ms. Brandt?

2 A Okay.

3 Q I think you and the other family members said that
4 you felt intimidated by the officers present?

5 A Yes.

6 MS. BRANDT: Objection, Your Honor, this is
7 outside the scope of the direct examination.

8 THE COURT: Overruled.

9 Q (By Ms. Dean) Did you expect to have a pleasant
10 experience in a courtroom of a family member of a person on
11 trial for the murder of a police officer?

12 A No.

13 Q And did you expect that the police officers might
14 show up for a fallen colleague?

15 A Yes.

16 Q And did you expect that they might show up to
17 support the family of a fallen colleague?

18 A Yes.

19 Q In each of your affidavits, you have indicated
20 that the hallway outside the courtroom was filled with
21 uniformed police officers and that you felt intimidated; is
22 that correct?

23 A Yes.

24 Q Was the jury nearby when you interacted with the
25 police officers in the hallway?

1 MS. BRANDT: Again, objection, Your Honor, this is
2 irrelevant. We are talking about the testimony with
3 respect to the presence of the police officers.

4 MS. DEAN: Your Honor, this is in his affidavit
5 that is attached to Lydia's application. And it goes
6 directly to the coercive influence of the police
7 officers in the courtroom.

8 MS. BRANDT: They can't be coercive if they are
9 not in the courtroom.

10 MS. DEAN: That's what I am getting at, Your
11 Honor.

12 THE COURT: Court will overrule the objection.

13 Q (By Ms. Dean) Did you answer the question, was
14 the jury nearby when you interacted with the police in the
15 hallway?

16 A Did I what now?

17 Q Was the jury present when you were interacting
18 with the police officers in the hallway?

19 A No.

20 Q You also said that you are upset about the
21 bailiffs joking about the stun belt?

22 A Yes.

23 Q Were the jury nearby when the bailiffs were joking
24 about the stun belt?

25 A No.

1 Q You also suggested that you were concerned, in
2 your affidavit, about the metal detector out in front of the
3 courtroom; is that correct?

4 A Yes.

5 Q Okay. Are you aware that the sheriff's office
6 placed a metal detective outside of the courtroom because of
7 a remarks that Mr. Ruiz's brother made from a phone call
8 from jail?

9 A No.

10 Q And are you aware that the sheriff's office often
11 place metal detectives outside the courtroom in death
12 penalty trials?

13 A No.

14 Q Does it seem reasonable to you that a death
15 penalty trial would be afforded the heightened security?

16 A Yes.

17 Q I believe you indicated in your affidavit that you
18 were concerned about the police officers who escorted you to
19 the parking garage after the sentence was handed down; is
20 that correct?

21 A Yes.

22 Q Was it possible they were trying to protect you?

23 A Yes.

24 Q Okay. Would you agree that just because you felt
25 that the police presence was overkill, the jury may not have

1 perceived it that way?

2 A Excuse me?

3 Q Just because you felt that the police presence was
4 overkill, do you agree that the jury may not have perceived
5 it that way?

6 MS. BRANDT: Objection, Your Honor, he has no way
7 of knowing what they perceived.

8 MS. DEAN: I am just asking for his opinion, Your
9 Honor.

10 THE COURT: The witness may give an opinion, if he
11 is able to do so.

12 You may answer the question, sir.

13 A Okay.

14 Q (By Ms. Dean) I guess the question is, the jury
15 might think it is reasonable to have a lot of police
16 officers in the courtroom in the death penalty of a trial
17 involving a murdered police officer, do you agree?

18 A Yes.

19 Q Okay. You love your grandson, don't you?

20 A Yes.

21 Q And that's why you are here being so forthcoming
22 today?

23 A Yes.

24 MS. DEAN: That's all I have, thank you.

25

1 REDIRECT EXAMINATION

2 BY MS. BRANDT:

3 Q Mr. Ziegenhain, the prosecutor asked you about
4 heightened security in a death penalty trial, the Dallas
5 Police Officers that you saw in the courtroom were not here
6 for security purposes, were they?

7 A I don't think so.

8 Q Okay. They were here as spectators?

9 A Yes.

10 Q And they were here essentially as a show of force?

11 A Yes.

12 Q And --

13 MS. BRANDT: I have no further questions.

14 THE COURT: Anything further?

15 MS. DEAN: Just one more question.

16 THE COURT: Certainly.

17 RECROSS-EXAMINATION

18 BY MS. DEAN:

19 Q Mr. Ziegenhain, did the officers do or say
20 anything in the courtroom that the jury could hear?

21 A I don't know.

22 Q Okay.

23 FURTHER REDIRECT EXAMINATION

24 BY MS. BRANDT:

25 Q I have one follow-up. Whether they said anything

1 or not, the fact is, there were a substantial number of them
2 who were just present; is that correct?

3 A Yes.

4 MS. BRANDT: I have nothing else.

5 MS. DEAN: I have nothing else.

6 THE COURT: Thank you, sir, you may step down.

7 MS. BRANDT: My next witness is Sue Ziegenhain.

8 Your Honor, may we excuse Mr. Ziegenhain so he may
9 stay in the courtroom.

10 THE COURT: Any objections?

11 MS. SHIN: No, Your Honor.

12 THE COURT: Sir, you are released from the Rule.

13 You may remain in the courtroom.

14 (Witness entered the courtroom.)

15 THE COURT: You may be come down, ma'am.

16 (Witness complies.)

17 THE COURT: You may proceed.

18 SUE ZIEGENHAIN

19 was called as a witness, and having been duly sworn by the
20 Court, testified under oath as follows:

21 DIRECT EXAMINATION

22 BY MS. BRANDT:

23 Q Good morning, Ms. Ziegenhain. Could you state
24 your name, please.

25 A Sue Ziegenhain.

1 Q And are you related to the gentleman seated next
2 to me?

3 A Yes.

4 Q And can you tell me who he is, please?

5 A My grandson.

6 Q And were you present during your grandson's trial
7 for the death of Officer Nix?

8 A Yes.

9 Q And at any time during the trial, were you present
10 in the courtroom?

11 A Yes.

12 Q And could you tell me what you saw -- how many
13 days were you present in the courtroom?

14 A One.

15 Q And could you tell me what you saw when you were
16 in the courtroom?

17 A I saw pretty much everything that is right here
18 now.

19 Q Did you see law enforcement in the courtroom?

20 A Oh, yes.

21 Q And how did you know they were law enforcement?

22 A I could see their badges, uniforms, their weapons,
23 handcuffs.

24 Q Okay. Okay. And what kind of law enforcement did
25 they appear to be?

1 A Well, the sheriff's department and Dallas Police
2 Department.

3 Q Okay. And, too, we are going to look at the
4 courtroom for record purposes, so we are going to talk about
5 who is to your right, up here, who is to your right, the
6 Judge; is to your right?

7 A Oh, yes.

8 Q And so there is a wall to your right, also?

9 A Yes.

10 Q And there is a wall to the back?

11 A Yes.

12 Q And before that back wall, there is a gallery; is
13 that correct?

14 A Yes.

15 Q Could you tell me where you saw the Dallas Police
16 Officers?

17 A They were --

18 Q Just tell me where, first?

19 A The wall to my right.

20 Q Okay.

21 A Back by the gallery.

22 Q Besides the wall to the right, where else did you
23 see them?

24 A On the back wall. And there were officers sitting
25 behind the Nix family.

1 Q Okay. When you talk about the officers, who
2 were -- they were standing along the wall to your right?

3 A Yes.

4 Q And they were in the gallery area?

5 A Yes.

6 Q And about how many did you see standing along the
7 wall?

8 A Maybe five, six to eight.

9 Q Okay. And how many were standing at the back?

10 A Probably -- I will say probably four.

11 Q And do you recall how many were seated?

12 A Oh, there were at least six on the -- the right
13 side of the courtroom -- from here to the left, behind the
14 Nix.

15 Q You are talking to your left?

16 A Yes, to my left, here.

17 Q And they were seated in the pews?

18 A Yes.

19 Q Okay. So is it a fair statement to say that at
20 any one point in time, the number, the total number of
21 Dallas Police Officers, if I am adding this up correctly, is
22 about 16, 16 to 20?

23 A Yeah. I would say closer to 20.

24 Q Okay:

25 MS. BRANDT: I have no further questions.

1 THE COURT: Cross-examination.

2 CROSS-EXAMINATION

3 BY MS. DEAN:

4 Q Ms. Ziegenhain, my name is Christi Dean. I am
5 representing the State of Texas, with Grace Shin. We have
6 never met before, have we?

7 A No.

8 Q I would just like to ask you about your testimony
9 regarding how many police officers were in the courtroom.
10 Your husband testified that there were ten to 15, you are
11 testifying 20?

12 A Yes.

13 Q Is there an inconsistency there?

14 MS. BRANDT: Objection, Your Honor, this is
15 comparison testimony.

16 THE COURT: Sustained.

17 Q (By Ms. Dean) Okay. Ms. Ziegenhain, your
18 testimony is that there were 20 police officers in the
19 courtroom; is that correct?

20 A Yes.

21 Q Do you expect that police officers might show up
22 for a fallen colleague of the trial of a police officer?

23 A Yes.

24 Q And you expect they might show support of the
25 fallen colleague?

1 A Yes.

2 Q Did the police officers do or say anything in the
3 courtroom that appeared inappropriate or that the jury could
4 see or hear?

5 A Inappropriate?

6 Q For instance, were there any outbursts?

7 A No.

8 Q Could the jury see or hear anything that they were
9 saying?

10 A I don't know what the jury heard.

11 MS. DEAN: No further question, Your Honor.

12 MS. BRANDT: I have one follow up.

13 REDIRECT EXAMINATION

14 BY MS. BRANDT:

15 Q When she talked about did the police officers do
16 or say anything, the fact is their presence was the conduct;
17 is that correct?

18 A Their presence was quite evident.

19 Q Okay. And so they were there as a show of force?

20 MS. DEAN: Objection, Your Honor, she is asking
21 the witness to draw a conclusion.

22 THE COURT: State your question again.

23 Q. (By Ms. Brandt) Why do you believe the police
24 officers were present, what was their purpose for being
25 there?

1 A They wanted to hear the judgment.

2 Q Did they also want to send a message to the jury?

3 MS. DEAN: Objection, Your Honor, that's leading.

4 THE COURT: I will overrule that objection.

5 Q. (By Ms. Brandt) Did they want to send a message to
6 the jury?

7 A By their presence?

8 Q Yes.

9 A I believe so, yes.

10 MS. DEAN: Objection, Your Honor, that's
11 speculation.

12 THE COURT: Sustained.

13 MS. BRANDT: I have no further questions.

14 THE COURT: Any further questions, Ms. Dean?

15 MS. DEAN: No further questions, Your Honor.

16 MS. BRANDT: Your Honor, I would like to release
17 this witness, if she could stay in the courtroom.

18 THE COURT: Any objections?

19 MS. SHIN: No, Your Honor.

20 THE COURT: You may step down, ma'am. You are
21 released from the Rule. You may remain in the
22 courtroom.

23 THE WITNESS: Thank you.

24 MS. BRANDT: My next witness is Barbara Ruiz.

25 (Witness entered the courtroom.)

1 THE COURT: You may take the stand, ma'am.

2 (Witness complies.)

3 THE COURT: You may proceed.

4 **BARBARA RUIZ**

5 was called as a witness, and having been duly sworn by the
6 Court, testified under oath as follows:

7 **DIRECT EXAMINATION**

8 BY MS. BRANDT:

9 Q Good morning. Could you state your name for the
10 record, please.

11 A Barbara Ruiz.

12 Q And do you know the gentleman who is seated to my
13 left, which is your right?

14 A My son.

15 Q Okay. And were you here during the trial of your
16 son? Were you down at the courthouse during the trial of
17 your son?

18 A Yes.

19 Q And were you present in the courtroom at least
20 part of the time that the trial was going on?

21 A Yes.

22 Q And could you tell me how many days you were in
23 the courtroom?

24 A One.

25 Q Okay. When you were in the courtroom, what did

1 you observe that you thought maybe was out of the ordinary?

2 A There was a lot of police officers in the room.

3 Q How did you know they were police officers?

4 A They carried -- they had guns, they had badges,
5 uniforms.

6 Q Okay. And so that we can get oriented to the
7 courtroom, to your right, who is the person who is seated up
8 here?

9 A The Judge.

10 Q Okay. And so this wall over here is to your
11 right?

12 A Right now, yes.

13 Q Okay. And there is another wall in the back of
14 the courtroom?

15 A Yes.

16 Q And before we get to that back wall, there is also
17 the gallery where people can sit down?

18 A Right.

19 Q Okay. Tell me of those places, what is the first
20 place that you recall that the police officers were located?

21 A Down that right wall.

22 Q When you say down there, the record doesn't know
23 what that mean?

24 A Along the right wall.

25 Q Along the right wall. And that was behind this

1 divider; is that correct?

2 A Correct.

3 Q So it was where the gallery area was?

4 A Yes.

5 Q And how many police officers did you see along the
6 right wall?

7 A Ten.

8 Q And what were they doing?

9 A Standing there observing.

10 Q Okay. And did you see any law enforcement along
11 the back wall?

12 A Correct, yes.

13 Q And how many did you see?

14 A Another ten.

15 Q Did you see any other Dallas Police Officers?

16 A Yes.

17 Q And where did you see them?

18 A Seated on the -- to your left -- to your right, my
19 left.

20 Q Okay. And about how many law enforcement officers
21 did you see seated?

22 A I would say another five.

23 Q Another five. So we are looking at about 25?

24 A Yes, ma'am.

25 Q Could be a little more or a little less?

1 A I would say more, but I would say 25 for sure.

2 Q And based on your observation -- let me back up a
3 second. At what point in time were they in the courtroom --
4 did you see all 25 together at one time?

5 A Yeah.

6 Q Okay. And were they present in the courtroom, all
7 25 of them, about the time that testimony was being taken?

8 A Yeah.

9 Q And do you know what closing argument is, is when
10 the Judge -- when the attorneys argue before the jury goes
11 out for their verdict?

12 A Right, right.

13 Q Okay. Were there 25 police officers present?

14 A Yes.

15 Q During their closing argument?

16 A Yes.

17 Q When the verdict -- the jury returned its verdict,
18 were there more or less police officers to hear the verdict?

19 A I would say more had come in by then.

20 Q Okay.

21 THE COURT: I'm sorry, could you --

22 THE WITNESS: I think more had come in by then.

23 MS. BRANDT: Okay, I have no further questions.

24

25

CROSS - EXAMINATION

2 BY MS. DEAN:

3 Q Ms. Ruiz, my name is Christi Dean. And I am
4 representing the State of Texas, with Grace Shin. We have
5 never met before, have we?

6 A N O :

7 Q I want to ask you a couple of questions about your
8 testimony. It is your testimony that there were at least 25
9 officers in the courtroom on the day that you were here?

10 A Yes.

11 Q Okay. Why do you think there were police officers
12 in the courtroom?

A To observe what was going on.

14 Q You agreed with Ms. Brandt that it was out of the
15 ordinary to be here, why do you say it is out of the
16 ordinary?

I didn't say it was out of the ordinary.

18 Q Why did you agree with her it was out of the
19 ordinary?

20 A I just thought it was -- I have been in the
21 courtrooms before and I hadn't seen it like that.

22 Q But have you ever been in a courtroom of a death
23 penalty trial where a person is on trial for murdering a
24 police officer?

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1 Q Do you expect the police officers might show
2 support for a fallen colleague?

3 A Yes.

4 Q And that they might show support for the family of
5 a fallen colleague?

6 A Yes.

7 Q Did the police officers do or say anything
8 inappropriate that you saw?

9 A No.

10 Q Could the jury hear them doing or saying anything?

11 A I doubt it.

12 MS. DEAN: No further questions, Your Honor.

13 REDIRECT EXAMINATION

14 BY MS. BRANDT:

15 Q I have a couple of questions for you, when she
16 talked about did they do or say anything, just their
17 presence was doing something, right, the number of police?

18 A Yes.

19 Q And that's why you thought it was out of the
20 ordinary?

21 A Yeah.

22 Q And did you perceive that they were trying to send
23 a message to the jury?

24 A Yes.

25 Q And what message did you perceive them sending?

1 A Choose the death penalty.

2 Q To choose the death penalty.

3 MS. BRANDT: I have no further questions.

4 THE COURT: Any further questions?

5 MS. DEAN: No, Your Honor.

6 THE COURT: You may step down, ma'am.

7 MS. BRANDT: Your Honor, if we could also excuse
8 this witness, if she could stay in the courtroom.

9 THE COURT: Any objections?

10 MS. SHIN: No, Your Honor.

11 THE COURT: Ma'am, you are released from the Rule,
12 you may stay in the courtroom.

13 THE WITNESS: Thank you.

14 MS. BRANDT: The next witness is Kevin Brooks.

15 (Witness entered the courtroom.)

16 THE COURT: You may proceed.

17 KEVIN BROOKS

18 was called as a witness, and having been duly sworn by the
19 Court, testified under oath as follows:

20 DIRECT EXAMINATION

21 BY MS. BRANDT:

22 Q Would you state your name for the record, please.

23 A Kevin Brooks.

24 Q Mr. Brooks, do you know the person who is seated
25 to your right, my left?

1 A The defendant, Mr. Ruiz.

2 Q And how do you know him?

3 A I was the prosecutor in his trial.

4 Q What level of prosecutor, were the lead or
5 co-counsel?

6 A I was the lead prosecutor.

7 Q And could you tell me how long you were a
8 prosecutor in Dallas County?

9 A Total six years.

10 Q As lead counsel?

11 A Well, at the time that I was the lead prosecutor
12 for his trial, I was the felony trial bureau chief.

13 Q Okay. And approximately how many capital cases
14 had you tried during the six years?

15 A I need to explain, I was with the D.A.'s office in
16 two stints. The first stint was two years.

17 Q About when?

18 A 1990 to '92. And then in 2007, I became the
19 felony trial bureau chief. So that was four, four and a
20 half years. And in that time, in that four-and-a-half-year
21 period of time, I tried one capital murder case which was
22 the defendant's.

23 Q And are you still working for the Dallas District
24 Attorney's office?

25 A No.

1 Q When did you leave?

2 A June 3rd, 2011.

3 Q And what are you doing right now?

4 A I am in private practice as a criminal defense
5 attorney.

6 Q And are you doing any capital cases as a defense
7 lawyer?

8 A No.

9 Q Primarily felonies?

10 A Primarily felonies.

11 Q Okay. Did you provide an affidavit at the request
12 of the State of Texas?

13 A Yes.

14 Q Do you have a copy it have with you?

15 A In my briefcase.

16 Q Do you need a copy to refer to it on the stand?

17 A Yes.

18 MS. BRANDT: Do you have any objections if I
19 provide him with a copy?

20 MS. SHIN: Sure.

21 MS. BRANDT: Sure what --

22 MS. SHIN: What was the question?

23 MS. BRANDT: Do you have any objection if I
24 provide him with a copy of his affidavit?

25 MS. SHIN: No, I don't.

1 MS. BRANDT: May I approach?

2 THE COURT: You may.

3 Q. (By Ms. Brandt) What I would like to first get
4 into is the issue of law enforcement in the courtroom. Were
5 you present during voir dire?

6 A Off and on.

7 Q So voir dire was essentially assigned to other
8 lawyers to select a jury; is that correct?

9 A That's correct.

10 Q Were you present during guilt/innocence?

11 A Yes.

12 Q And were you present during punishment?

13 A Yes.

14 Q Okay. And both in guilt/innocence and punishment,
15 you were the lead attorney in those two phases; is that
16 correct?

17 A I am primarily the lead attorney during
18 guilt/innocence. Andy Beach was primarily the lead attorney
19 during the punishment phase.

20 Q Even though Andy Beach was lead during the
21 punishment phase, were you in the courtroom during the
22 entire time of the punishment phase?

23 A Yes.

24 Q And the same is true of guilt/innocence, you were
25 present during the entire time?

1 A Correct.

2 Q Do you recall seeing law enforcement in the
3 courtroom during the guilt/innocence phase?

4 A Yes.

5 Q And could you tell me specifically what type of
6 law enforcement, where were they from, what was their --

7 A There were Dallas Police Officers. And I recall
8 at times seeing Mesquite Police Officers.

9 Q Mesquite?

10 A Irving, I mean there were just police officers in
11 the courtroom.

12 Q So you recall seeing police officers from
13 different departments or different locales?

14 A At times.

15 Q Okay. So the Dallas Police Officers would have
16 been from the City of Dallas, right?

17 A Yes.

18 Q And the officers that you refer to as Mesquite,
19 are from the City of Mesquite?

20 A Correct.

21 Q And the officers from Irving, are a different city
22 altogether, that's the City of Irving?

23 A Correct.

24 Q What other locales did you see officers from?

25 A Probably Richardson. I mean, I can't give you any

1 names, I just have recollection of seeing various police
2 officers, police departments at times throughout the trial.

3 Q Okay. And how did you know that they were from
4 these different locales?

5 A They were in uniform.

6 Q And the uniforms for each of these locales was
7 different, they indicated where they were from?

8 A They would have markings that would have indicated
9 what department they were with, yes.

10 Q And did you also see law enforcement -- other
11 types of law enforcement -- I am specifically thinking for
12 example the sheriff's department?

13 A Just the bailiffs that were in the -- present in
14 the courtroom.

15 Q And how many of them did you see?

16 A I can't recall.

17 Q Let's go back to the -- when you talk about law
18 enforcement from Dallas, Mesquite, Irving and Richardson,
19 did you see the law enforcement from these various
20 jurisdictions during the guilt/innocence phase?

21 A I can't tell you specifically which portion of the
22 trial I would have seen these officers.

23 Q But you do recall officers from different locales
24 coming in during guilt/innocence --

25 A Yes.

1 Q -- is that correct? And you also recall police
2 officers from these various locales coming in during the
3 punishment phase?

4 A Yes.

5 Q Do you recall at any one point in time how many
6 officers from the Dallas Police Department there were during
7 the guilt/innocence phase?

8 A I wouldn't be able to answer that.

9 Q And how about from Mesquite or Irving?

10 A I couldn't give you a number.

11 Q Okay. Altogether at any one time from all of the
12 different branches, do you recall how many?

13 A No.

14 Q Would they be more than five?

15 A Yes, more than five.

16 Q Would they be more than ten?

17 A More than ten.

18 Q Would they be more than 15?

19 A Perhaps.

20 Q Could be 20?

21 A I am not sure I could say there were 20. Are you
22 talking about each day of the trial.

23 Q I am talking about the number of police officers
24 in the courtroom at any one time in guilt/innocence?

25 A I wouldn't be able to give you a number, I would

1 be speculating.

2 Q But at least you recall 15 police officers?

3 A That sounds like a fair number.

4 Q Okay. So it is more than 15, less than 20?

5 A That's probably about right.

6 Q Okay. And this is in addition to the individuals
7 from the sheriff's department?

8 A Yes.

9 Q And about how many officers from the sheriff's
10 department -- from the sheriff's department at any one time?

11 A I don't recall.

12 Q Could it be about five?

13 A I don't recall how many bailiffs.

14 Q You don't recall. Okay. When we talked about the
15 number of 15 to 20 of these officers from Dallas or Mesquite
16 or Irving or Richardson, these individuals were not there to
17 provide courtroom security; is that true?

18 A To my knowledge, no, they were not part of the
19 security, no.

20 Q And when you saw these officers in the courtroom,
21 where were they located? And let me again see if we can
22 orient the courtroom. To your right, who is up here,
23 please?

24 A Judge.

25 Q And so we have got the wall to the right, and we

1 have got a wall to the back, and between where counsel is
2 and the back wall, there is a railing. And between that
3 railing and the back wall is a gallery for spectators; would
4 you agree with that?

5 A Yes.

6 Q When you talk you about seeing the police officers
7 in the courtroom, did you see any of them standing along the
8 wall to your right?

9 A I don't recall seeing any standing, no.

10 Q Where did you -- where do you recall seeing law
11 enforcement?

12 A Sitting in the gallery.

13 Q And you recall seeing them during the
14 guilt/innocence, right?

15 A Sitting in the gallery, right.

16 Q And did you also recall seeing them sitting in the
17 gallery during the punishment phase?

18 A Yes.

19 Q Do you recall seeing more officers present during
20 closing argument than during testimony?

21 A No.

22 Q So you can't remember right now exactly when you
23 saw them, you were busy trying the case?

24 A Correct.

25 Q Okay. Did you do any jury selection by any

1 chance?

2 A No.

3 Q Do you recall that there was a dispute between the
4 Defense and the State of Texas concerning the recordings
5 that were made of the encounter between Mr. Ruiz and Officer
6 Nix?

7 A Okay, can you be more specific. When you say
8 "dispute," what are you referring to?

9 Q Ah, I am referring to a stipulation of facts --
10 and Mr. Brauchle did not bring it back --

11 MS. BRANDT: Could we give that to the witness,
12 would that be all right?

13 MS. SHIN: Yes.

14 MS. BRANDT: Thank you, Your Honor.

15 THE COURT: Certainly.

16 Q. (By Ms. Brandt) Just to help you out, Mr. Brooks,
17 the District Attorney and I have stipulated to facts as
18 shown in the reporter's record and the clerk's record,
19 because we have a limited amount of time for evidentiary
20 hearing. So if you look at page two, and I don't know if
21 you have any independent recollection of this, would you
22 agree that on March 23rd, 2007, was the date of the offense?

23 A Yes.

24 Q Okay. And is it common knowledge that when law
25 enforcement is communicating by radio, for example between

1 and among themselves, this would be recorded; is that true?

2 A I don't know that that is common knowledge.

3 Q Well, defense attorneys would know that; is that
4 true?

5 A Yes, defense attorneys would know that.

6 Q And prosecutors would know that?

7 A Yes.

8 Q And they would have known that in 2006 (sic)?

9 A Yes.

10 Q And so they would have known that on March 23rd,
11 all of these communications were being recorded here in
12 Brock Richardson talks about it on the city server. I am
13 looking at page two?

14 A When you say all these records, what --

15 Q Well, the recordings on the various channels where
16 law enforcement is talking to one another, those
17 communications are being recorded?

18 A Correct.

19 Q Okay. And is it common knowledge among legal
20 professionals that routinely those recordings are erased or
21 destroyed after 30 days?

22 A In the legal profession, yes.

23 Q Okay. And so in 2006, if the recording was made
24 on March 23rd, 2007, of the encounter between Mr. Ruiz and
25 Officer Nix, 30 days thereafter, that original source of

1 those recordings would have been destroyed is that true?

2 A I mean, that would be the policy. I don't know if
3 that's what took place in this situation.

4 Q Well, do you recall that there was a hearing where
5 officer Brock testified that 30 days later the recording was
6 erased from the city server?

7 A No, I don't. I know it is part of the
8 stipulation, but I don't have an independent recall of that
9 testimony.

10 Q So you have no independent recollection
11 whatsoever; is that correct?

12 A That's correct.

13 MS. BRANDT: Your Honor, could I approach him with
14 the trial transcript to refresh his recollection?

15 THE COURT: You may.

16 Q. (By Ms. Brandt) For the record, I am showing
17 Mr. Brooks Volume 40 of the reporter's record, and this is
18 page 51 and 52, if you could look at that, please, right
19 here?

20 A Okay.

21 Q Okay. So based on the trial transcript that you
22 just read, the policy is to destroy the original source
23 after 30 days?

24 A Yes.

25 Q And that was done in this case?

1 A That's what he testified to, so I am assuming so.

2 Q Do you recall when Mr. Brauchle was appointed to
3 represent Mr. Ruiz?

4 A I don't have any knowledge of the date in which he
5 was appointed.

6 Q You are familiar with the court file, though, on
7 this case?

8 A Yes.

9 Q Okay. And --

10 MS. BRANDT: Your Honor, if I may approach?

11 THE COURT: You may.

12 Q. (By Ms. Brandt) Could you identify what this
13 volume is, please.

14 A Clerk's record, volume one of two.

15 Q Okay. And what page are we looking at here?

16 A I can't make that out.

17 Q It's an --

18 A Okay, page eight.

19 Q And can you tell me what this states up here?

20 A Initial P. Brauchle, abbreviation for appointment
21 8/29/07.

22 Q Is that an eight or is that a three?

23 A It would have to be a three.

24 Q It is a three. So based on this court record,
25 Mr. Brauchle was appointed six days after the offense?

1 A That's what it looks like.

2 Q Okay. And you had stated that attorneys, defense
3 attorneys would commonly know that the communications
4 between and among law enforcement are taped; is that
5 correct?

6 A Most attorneys would know that. But -- it is part
7 of a broader base of knowledge in that 911 calls and things
8 of those nature are normally held for 30 days and then
9 erased.

10 Q And so you would agree that Mr. Brauchle is an
11 experienced criminal defense attorney?

12 A Yes.

13 Q And so since this is common knowledge, this is the
14 kind of thing that he would know?

15 A I would have to think so.

16 Q Okay. Let me ask you about Brady material. As a
17 prosecutor, you run into Brady requests all the time, don't
18 you?

19 A I did, yes.

20 Q Okay. Normally it is up to the -- does the
21 Defense just sit back and the State turn over everything it
22 has to them?

23 A Most defense attorneys file motion asking for
24 Brady material.

25 Q Okay. And so they would file motions for

1 discovery also?

2 A Yes.

3 Q And that's essentially how you put that into
4 motion to get Brady material, you would file a motion for
5 discovery?

6 A You would do that. But in Dallas County, there is
7 an informal practice of turning things over to the Defense,
8 even though they haven't filed a request for Brady. Most
9 defense attorneys do file a request for Brady sort of as a
10 CYA action, but Dallas County for the most part is open-file
11 policy and Brady material is turned over for the most part
12 without the Defense having to first ask for it.

13 Q Are these audio recordings considered Brady
14 material?

15 A I wouldn't say I consider them Brady material. I
16 would say they are considered discoverable evidence. I
17 wouldn't say that the recordings by themselves, just in and of
18 themselves Brady.

19 Q This material, these audio recordings, they didn't
20 belong to the State of Texas, right, they weren't the
21 prosecutor's work product?

22 A No.

23 Q Okay. And you would have had access to the
24 original source material during the first 30 days that they
25 were in existence; is that correct, if you had wanted to get

1 them?

2 A If I had wanted them in the first 30 days, I would
3 think so.

4 Q Okay. And would the Defense also have access to
5 that within the first 30 days?

6 A Independent access?

7 Q Yes.

8 A No.

9 Q How would they have gotten it?

10 A They would have had to file a request for it.

11 Q They would have had to file a request with the
12 Judge to get an order?

13 A I mean, if they were seeking the recordings during
14 the first 30 days, anything that had not already been
15 provided for them, they would have filed a motion for it.

16 Q Or they could have done it by subpoena?

17 A That I don't know.

18 Q Okay. There was nothing that you, and when I say
19 you, I am talking about you as the lead prosecutor, did that
20 prevented the Defense from getting access to the original
21 source of the audio recordings during the first 30 days, was
22 there?

23 A No.

24 Q And did anybody on the prosecutor's team do
25 anything that prevented the Defense access?

1 A Not to my knowledge.

2 Q Did -- do you recall the Defense making a request
3 to you for the original source of those audio recordings
4 during the first 30 days they were in existence?

5 A I am going to have to say, yes, but I can't give
6 you specific date on when they asked for recordings. I
7 can't give you specific date.

8 Q So you can't remember if they -- when they asked
9 you, you just remember they asked for the audio recordings?

10 A Yes.

11 MS. BRANDT: Your Honor, may I approach?

12 THE COURT: You may.

13 Q. (By Ms. Brandt) Let me show you this. And could
14 you identify what that document is for us?

15 A Motion for Discovery, Production and Inspection of
16 Evidence Number One.

17 Q Okay. And what is the page on the bottom of that?

18 A Sixty-two.

19 Q And could you tell me what that volume is, please.

20 A Volume one.

21 Q Of what?

22 A Of two.

23 Q Of?

24 A Clerk's record.

25 Q Of the clerk's record. And this is what document

1 is that on page 62?

2 A Looks like the same one I am looking at.

3 Q And what is the name of that document, please.

4 A Motion for Discovery, Production and Inspection of
5 Evidence Number One.

6 Q And could you turn to the last page on there,
7 please.

8 A Okay.

9 Q What is -- who signed that?

10 A Paul Brauchle.

11 Q And could you tell me what the date on the
12 certificate of service is?

13 A December 6th, 2007.

14 Q So if this is the first written motion for
15 discovery, it is almost eight months later; is that correct?

16 A Correct.

17 Q So this would be the first time that he made a
18 written request of you or of the State?

19 A If this is the first filed motion. I can tell you
20 that they had copies of all the recordings prior to this
21 being filed.

22 Q But do you know when?

23 A I can't tell you when, but I know that they had
24 copies of the recordings that we had in our possession well
25 prior to December of '07.

1 Q But they have access to the original source. They
2 had copies of the recordings, but did they have the original
3 source, what was on the city server?

4 A No, they had what we had.

5 Q Okay. So what you had were copies of what law --
6 what the record custodian had made?

7 A Yes.

8 Q Okay. So you didn't have access to the original
9 source of the audio recording, cause that had been destroyed
10 after 30 days?

11 A In what time frame U mean in December, I didn't
12 have access or.

13 Q Well, in December of 2007, you did not have access
14 to the original source of the audio recordings, because it
15 had been destroyed?

16 A No, I would not have had access in December.

17 Q Okay. Let me clarify something just so that we
18 have got a time frame. If the offense was March 23rd of
19 2007 and the record -- the original source of those audio
20 recordings are destroyed 30 days later, would you agree with
21 me, 30th day would be April 22nd of 2007?

22 A April -- say that day again.

23 Q April 22nd of 2007?

24 A Sounds about right.

25 Q Could I show you a calendar so we can verify that?

1 A Sure.

2 MS. BRANDT: Your Honor, may I approach?

3 THE COURT: You may.

4 Q. (By Ms. Brandt) And so looking at this calendar
5 for 2007, you can see March 23rd, 2007; is that correct?

6 A Yes.

7 Q And what date is that?

8 A That's a Friday.

9 Q And if we calculate 30 days out, what date is
10 that?

11 A Your calculation is April 22nd, 2007.

12 Q And what day of the week is that?

13 A Sunday.

14 Q That's a Sunday. So normally law enforcement
15 isn't going to be working in its administrative offices on a
16 Sunday, right?

17 A I don't know.

18 Q But if 30 days from March 23rd is when they
19 destroyed the evidence or destroyed the original source, it
20 was destroyed either April 22nd or shortly thereafter?

21 A According -- yes.

22 Q So by December 2007, the State would not have had
23 access to the original source of the audio recordings; is
24 that correct?

25 A That would be correct.

1 Q And the Defense would not have had access to the
2 original source of those audio recordings?

3 A No.

4 Q Okay. There were copies made of some of the
5 original source material; is that correct?

6 A Yes.

7 Q Okay. And it's those copies that you provided to
8 the Defense?

9 A Correct.

10 Q And the Defense could have had access during the
11 first 30 days had they taken action to preserve or obtain
12 that?

13 A I would assume so.

14 Q Okay. Let me ask you, you are familiar with an
15 audio recording is physical evidence; is that true?

16 A Yes.

17 Q Okay. Are you an expert in audio?

18 A No.

19 Q And so normally if a lawyer isn't an expert in
20 audio or video or DNA or fingerprint, normally, what would
21 they -- what would they do?

22 A Hire an expert.

23 Q And what is the point of hiring an expert?

24 A To assist you and help you interpret evidence or
25 explain evidence to a jury.

1 Q If original law enforcement had said they could
2 not recover certain portions of whatever the physical
3 evidence is, if the expert had access to the original
4 source, the expert might show that a mistake had been made
5 by, I don't know, law enforcement, that in fact evidence
6 could have been recovered; is that correct?

7 A I guess in theory, yes.

8 Q So they can verify the accuracy or the reliability
9 of whoever did the analysis who came before?

10 A I guess, yes.

11 Q Okay. And sometimes as the technology progresses,
12 if the original source is not recoverable today, if the
13 technology improves a year from now, or two years from now
14 or three years from now, with that original source, that
15 technology in an expert's hands might be --

16 MS. SHIN: Your Honor, objection to speculation.

17 MS. BRANDT: It is not speculation, it is what an
18 expert does.

19 MS. SHIN: You are asking him what an expert would
20 find.

21 MS. BRANDT: No, I said that's the point of having
22 an expert.

23 THE COURT: Overrule the objection.

24 You may answer the question.

25 A Actually I can't answer that.

1 Q. (By Ms. Brandt) As technology improves, it is
2 possible that what was not obtainable from the original
3 source, it might be obtainable later because of the
4 improvement of technology?

5 A The reason I say I can't answer that, I am not
6 trying to be flip. Anything is possible.

7 Q Okay. Are you familiar with the capital
8 guidelines for defense?

9 A I haven't looked at them in sometime.

10 Q Okay. So essentially as a prosecutor, that's not
11 something that you would be interested in?

12 A No.

13 Q Let me ask you this, if I say to you, I want to
14 kill you, what do you hear?

15 A I hear you say you want to kill me.

16 Q You hear words?

17 A Yes.

18 Q And if I say to you, I want to kill you, and even
19 though the record doesn't reflect that, what do you hear?

20 A I hear words.

21 Q And do you hear an emotion behind that?

22 A I hear words spoken with force, yes.

23 Q Okay. And sometimes those words can indicate
24 whether or not somebody is angry; is that true?

25 A True.

1 Q And the inflection or loudness can tell whether or
2 not someone is joking, if I say, gosh, I am ready to kill
3 you?

4 A True.

5 Q So the inflection, the tone, and the words on an
6 audio can indicate someone's state of mind; is that true?

7 A Yes.

8 Q And so those audio recordings would have been
9 important to show state of mind?

10 A What audio recordings?

11 Q The audio recordings of the encounter between
12 Officer Nix and Wesley Ruiz?

13 A I am not sure I understand your question. Because
14 my recollection from the trial, there was not an audio
15 recording of a conversation between Mr. Ruiz and Mr. Nix.

16 Q The encounter between them, what law enforcement
17 was saying during the chase, that at one point should have
18 been -- would have been recorded had the machinery been
19 working; is that true?

20 A If the machine had been working, yes.

21 Q Okay. And when Officer Nix jumped out of his
22 vehicle and approached Mr. Ruiz in the car, anything that he
23 said would have been captured also?

24 A No. My recollection, and again this has been
25 three or four years ago, my recollection in preparing for

1 trial is that the -- once he exited his vehicle, his
2 personal recording device would not have been active.

3 Q Well, the -- the -- what law enforcement around in
4 the surrounding vehicles, their communication would have
5 been captured on the city server, wouldn't they?

6 A That I don't know. Because I don't know --
7 because my recollection, once he exited his vehicle, it was
8 no recording.

9 Q You are not answering the question. The question
10 is, the communications between and among other law
11 enforcement -- you had testified before that those
12 communications were recorded on the city server?

13 A What other officers are saying to each other?

14 Q Right.

15 A Yes.

16 Q And also the dispatcher?

17 A Yes.

18 Q Okay. And were there in-car videos going on?

19 A The only in-car video -- yes, there were in-car
20 videos, yes.

21 Q And those in-car videos, did not capture what had
22 been said -- did not capture the audio?

23 A No.

24 Q But what somebody's words and their inflection and
25 their tone is important because it indicates a state of

1 mind?

2 A It can, yes.

3 Q Okay. If -- do you recall Mr. Ruiz testifying?

4 A Yes.

5 Q Okay. And do you recall what he testified that
6 Officer Nix said?

7 A No.

8 MS. BRANDT: Your Honor, may I approach?

9 THE COURT: You may.

10 Q. (By Ms. Brandt) You have no independent
11 recollection?

12 A No, ma'am.

13 Q It has been too long?

14 A Yes, ma'am.

15 Q Could you identify what this volume is, please.

16 A Volume 47 of 59 of the court reporter's record.

17 Q And it is in?

18 A State of Texas versus Wesley Lynn Ruiz. And it is
19 Cause No. F07-50318, in the District Court, 194th Judicial
20 District Court.

21 Q Could you read this to yourself, please. I am
22 looking at page 16?

23 A (Witness complies.)

24 Q I am looking at that paragraph.

25 A Yes.

1 Q Could I get you to read that into the record so we
2 know what you are talking about. This is Mr. Ruiz talking?

3 A Yes.

4 Q Testifying?

5 A He said, ah --

6 Q He being Officer Nix?

7 A That's what he was testifying to, yes.

8 Q Okay. So go ahead.

9 A He said, Freeze, then he said -- he said, you
10 tried to run from me mother fucker, I am going to shoot you.
11 He said, You hear me. He said, I am going to kill you if
12 you try to run.

13 Q Okay. And so would you agree with me that the
14 original source, that audio that contained the audio, would
15 have been relevant to either corroborate or refute what
16 Mr. Ruiz testified to?

17 A No, I can't agree to that. Because my
18 recollection is that would not have been recorded once he
19 exited his vehicle.

20 Q Any recordings that were on that channel that were
21 made by Officer Nix would have shown his state of mind, this
22 was before he gets out of the car?

23 A If there were recordings of him having a
24 conversation, I guess, yes.

25 Q Okay. And if law enforcement had testified that

1 all that Nix uttered were police commands, audio recordings
2 would have been relevant facts to either dispute or
3 corroborate that?

4 A Yes.

5 Q Okay. Let me change to a different topic. Do you
6 do any appellate work at all?

7 A No.

8 Q But as a trial lawyer, you are aware that it is
9 important to develop a record?

10 A Yes.

11 Q Okay. And what is the purpose of developing a
12 record?

13 A Primarily for appellate, for appeals and preserve
14 error.

15 Q To preserve error. This may be asking you going
16 back to your law school days, but do you recall how to
17 properly object, what are the steps in properly objecting to
18 preserving an error for on appeal?

19 A Make your objection and make sure it was recorded
20 by the court reporter.

21 Q And would you agree that it -- objection has to be
22 timely?

23 A Yes.

24 Q And it also has to be specific?

25 A Yes.

1 Q And also it has to be specific so it puts the
2 Judge on notice?

3 A Yes.

4 Q And it gives the Judge an opportunity to correct
5 the error?

6 A Correct.

7 Q If he chooses to. Now, if you have an objection
8 that is -- for example, if I say I object to the increased
9 number of deputies in the courtroom, is that a sufficient
10 record?

11 A I would think so.

12 Q Well, if you were sitting as an appellate judge,
13 how would you know what the increase was?

14 MS. SHIN: Objection to speculation.

15 THE COURT: Sustained.

16 Q. (By Ms. Brandt) Would you agree that it's
17 important to perhaps have a hearing to develop more facts
18 with respect to some objections?

19 A Some objections can call for a hearing, yes.

20 Q And if that record isn't made, then essentially it
21 is not a good objection?

22 A I don't know that I could say that.

23 Q Well, it may not preserve the error?

24 A I don't know the answer to that either.

25 Q Okay. The objection has to be timely and it has

1 to be specific in order to preserve error?

2 A Yes.

3 Q Okay. And in some instances in order to preserve
4 error, there has to be a more robust fact developed?

5 A Some objections do call for a hearing, yes.

6 Q Okay.

7 MS. BRANDT: I have no further questions.

8 CROSS-EXAMINATION

9 BY MS. SHIN:

10 Q Hi, Mr. Brooks. My name is Grace Shin; but we
11 know each other, right?

12 A Yes.

13 Q This is my co-counsel, Christi Dean. I am going
14 to be asking you some follow-up questions about some of the
15 issues Ms. Brandt brought up. I know you had two stints as
16 a prosecutor for a total of six years. How many years have
17 you been licensed to practice law?

18 A I have been licensed since 1990.

19 Q And have you been practicing criminal law ever
20 since you became licensed?

21 A The entire time, yes.

22 Q Okay. With respect to the issue of officers in
23 the courtroom, did you ask any of the officers to be there
24 in the courtroom?

25 A No.

1 Q Are you aware of anyone who asked on behalf of the
2 State for the officers to be there?

3 A No.

4 Q Did any of these officers tell you that they were
5 there to intimidate the jury?

6 A No.

7 Q Are you aware of the officers telling anyone from
8 the State that that was their purpose in being there?

9 A No.

10 Q And given that this case involved the death of an
11 officer, were you surprised to see officers in the
12 courtroom?

13 A No. I have never seen a case involving the death
14 of a police officer where there were not police officers
15 present in the courtroom.

16 Q And during your time in the courtroom, did anyone
17 around you indicate surprise to you about the fact that
18 police officers were in the courtroom?

19 A No.

20 Q And with respect to the recordings, how did the
21 State come into possession of the recordings?

22 A They were turned over to us by the detectives who
23 were assigned to the case by DPD.

24 Q And did they represent to the State that those
25 were all the recordings that they were able to extract from

1 the server on this case?

2 A Yes.

3 Q Did you have any reason to believe that they were
4 lying?

5 A I didn't have any reason to believe they were
6 lying. I do know that defense insisted that there are
7 recordings that were missing. And we went back several
8 times to DPD to hammer out this issue whether or not there
9 were any further recordings. All the recordings that we had
10 in our possession were turned over to the Defense.

11 Q And did you have any reason to believe that DPD
12 withheld any recordings that you requested?

13 A No.

14 Q And I want to refer to the record stipulations
15 that were submitted by the Defense then, agreed to by me on
16 behalf of the State. Can you look at page two, number 5F,
17 and can you read that out loud.

18 A Because it was malfunctioning, the old system did
19 not record the police communications of the Nix-Ruiz
20 encounter from alternate channels.

21 Q And can you read subparagraph G. as well out loud.

22 A Which one?

23 Q The next paragraph, g, 5G?

24 A The NICE system also had defects, so it did not
25 record the police communications of the Nix-Ruiz encounter

1 from the alternate channels.

2 Q So do you think it is possible that the recordings
3 that the Defense is looking for in this case was unavailable
4 because it was never recorded?

5 A Yes.

6 Q Because sometimes equipments fail?

7 A Yes.

8 Q And that will be it.

9 MS. SHIN: Pass the witness.

10 REDIRECT EXAMINATION

11 BY MS. BRANDT:

12 Q Mr. Brooks, the District Attorney talked about the
13 individuals testifying that the recordings were not
14 recorded, and she asked you, well, were they lying; is that
15 correct? She asked you whether or not they were lying, when
16 they said they weren't recorded?

17 A I think she asked me is it --

18 MS. BRANDT: Can I get the court reporter to read
19 the question back.

20 THE COURT: If you will read the question back,
21 Ms. Baraka.

22 (Requested testimony was read back.)

23 Q. (By Ms. Brandt) These -- what the testimony was,
24 was by these particular law enforcement who were testifying
25 at the time of the trial is that these were all of the

1 recordings that those individuals, the custodians of the
2 record were the law enforcement themselves, were able to
3 extract; is that correct?

4 A Yes.

5 Q And so this isn't a question of them lying, it
6 could be that they may not have had the technical skills to
7 have extracted additional information; is that true? This
8 isn't a question of lying, this is a question of ability.

9 A I don't know if I can answer that the way you
10 phrased that question, I don't know if I can answer that.

11 Q That's the whole point of getting an expert is to
12 go back and look at the originals to determine whether or
13 not the expert can find something that -- that these
14 individuals, these record custodians couldn't find. They
15 are not experts in audio; would you agree with that?

16 A I don't know that.

17 Q Okay. But you don't necessarily take the word of
18 law enforcement at their words especially for physical
19 evidence?

20 A I am not sure I understand your question. I don't
21 take them at their word for physical evidence?

22 Q Yeah. If I make -- if law enforcement makes a
23 tape of something, and they came to you and said Mr. Ruiz is
24 innocent, we are going to dismiss the case, would you
25 dismiss the case or would you perhaps hire an expert to

1 review the original source of that recording?

2 A See the premise you are putting in front of me
3 wouldn't work that way. They wouldn't come to me and say we
4 are going to dismiss the case, it's their prerogative to
5 file the charge or not file the charge.

6 Q My point with physical evidence, if somebody makes
7 a representation, the other side has a right to go back and
8 do an independent investigation; is that true?

9 A Yes.

10 Q Okay. And the reason they do that independent .
11 investigation is because the opposing side, we don't know if
12 they have an agenda, they could have an agenda, right?

13 A Yes.

14 Q They could be mistaken?

15 A Yes.

16 Q They may not have the ability?

17 A Yes.

18 Q So we want an independent expert from the side of
19 the Defense or the side of the prosecution to review that
20 physical evidence; is that correct?

21 A I mean in theory, but --

22 Q That's fine, you just answered my question. So
23 essentially the source for that independent analysis is the
24 original source; is that correct?

25 A Yes.

1 Q Okay.

2 MS. BRANDT: I have no further questions -- let me
3 back up one more.

4 Q. (By Ms. Brandt) In this particular case, the
5 original source had been destroyed after 30 days, you had
6 testified to that earlier?

7 A Yes.

8 MS. BRANDT: I have no further questions.

9 MS. SHIN: I have a few.

10 RECROSS-EXAMINATION

11 BY MS. SHIN:

12 Q Did you have any reason to believe that the
13 individuals involved in extracting information from the
14 server were not qualified to do what they do?

15 A No.

16 Q (By Ms. Brandt) Or that -- to your knowledge is
17 the standard practice for the police department to retain
18 experts anytime they need to extract information from a
19 server?

20 A No.

21 Q Thank you.

22 MS. SHIN: That's all I have.

23 RECROSS-EXAMINATION

24 BY MS. BRANDT:

25 Q Mr. Brooks, you have no knowledge one way or the

1 other what the qualifications of the individual who
2 extracted the information was, do you?

3 A I don't have their personal qualifications, no.

4 Q So as a defense lawyer, you wouldn't completely
5 rely on what law enforcement represented, you would do your
6 due diligence and do an independent investigation, wouldn't
7 you?

8 A I mean again, it is a very broad question.

9 Q Okay. You would hire an expert to do an
10 independent analysis instead of taking the custodian of the
11 records's word for it as a defense lawyer now?

12 A It would depend on circumstances, ma'am.

13 MS. BRANDT: Okay, I have no further questions.

14 MS. SHIN: I don't have any questions for this
15 witness.

16 THE COURT: You may step down, sir.

17 THE WITNESS: Am I excused, Your Honor?

18 MS. BRANDT: Yes.

19 THE COURT: You are free to leave, sir.

20 We will recess for lunch at this time and
21 reconvene at 1:30.

22 (Lunch recess taken.)

23 (Defendant present in the courtroom.)

24 MS. BRANDT: Judge we have some witnesses to be
25 sworn.sworn.

1 (Witnesses were duly sworn.)

2 THE COURT: Your next witness.

3 MS. BRANDT: Dr. Kessner.

4 THE COURT: You may proceed.

5 GILDA KESSNER

6 was called as a witness, and having been duly sworn by the
7 Court, testified under oath as follows:

8 DIRECT EXAMINATION

9 BY MS. BRANDT:

10 Q Could you state your name for the record?

11 A Gilda Kessner.

12 Q And what is your profession?

13 A I'm a psychologist, licensed in Texas.

14 Q And are you -- do I call you doctor?

15 A Yes.

16 Q Could you please tell me what your qualifications
17 are to be a licensed psychologist.

18 A I completed a doctoral degree in clinical
19 psychology from Baylor University in 1996, which included a
20 one-year predoctoral APA internship. After graduation, I
21 took a job with the Texas Youth Commission for about a year,
22 which required that I be supervised by a licensed
23 psychologist in order to be licensed. In late 1997, I
24 qualified for my license in Texas.

25 Q And have you testified in capital cases?

1 A Yes.

2 Q And did you testify in the matter of State of
3 Texas versus Wesley Ruiz?

4 A Yes.

5 Q Could you tell me what you were asked to do at the
6 trial, what the point of having you testified?

7 A I testified on the issue of mitigation.

8 Q Did you testify at all in guilt/innocence?

9 A No, I did not.

10 Q And you testified exclusively in the punishment
11 phase?

12 A Yes.

13 Q Could you tell us what mitigation is, please.

14 A It is my understanding that it is any factor about
15 the individual positive or negative that could weigh on the
16 jury's decision to decide not to give the death penalty.

17 Q Did trial counsel ask you at all to review
18 material about Officer Nix?

19 A No.

20 Q And in fact you did no independent investigation
21 with respect to Officer Nix?

22 A Correct.

23 Q Okay. At the trial, were you qualified as an
24 expert?

25 A Yes.

1 Q Okay. And so you were recognized in that capacity
2 at trial?

3 A Yes.

4 Q Okay.

5 MS. BRANDT: And, Your Honor, I would ask that Dr.
6 Kessner be recognized also as an expert in this case.

7 THE COURT: Very well.

8 MS. DEAN: The State would object. She may be an
9 expert in mitigation, but she is not an expert in what
10 she is about to be asked about. Because of the nature
11 of this proceeding I am not inclined to take her on
12 voir dire, I am inclined to ask for a running objection
13 because --

14 THE COURT: I guess since you may know what she is
15 going to be asked next, but the Court doesn't.

16 MS. DEAN: Well, she is not -- I mean, Lydia
17 Brandt attached to her application, Dr. Kessner's
18 affidavit, and I assume Ms. Brandt is about to ask her
19 about what she attested in her affidavit and she is not
20 qualified. She is asking Dr. Kessner to testify
21 ultimately conclusion that have nothing to do with
22 mitigation or frankly anything psychologically related.

23 THE COURT: And the Court on that basis would
24 sustain the objection.

25 MS. BRANDT: Your Honor, can I make a record.

1 THE COURT: You may.

2 Q. (By Ms. Brandt) Before we get into the issue with
3 respect to Officer Nix, you were a witness at the trial; is
4 that correct?

5 A Correct.

6 Q All right. And so -- what are you currently doing
7 right now?

8 A I am a psychologist at the Dallas V.A. Medical
9 Center.

10 Q And do you evaluate individuals in a clinical
11 setting?

12 A Yes, I do.

13 Q And can you tell me what the context is for those
14 evaluations?

15 A I work in the compensation and pension clinic
16 where veterans anything from World War II up to the current
17 wars come in for medical violation from anything that may
18 have presented itself during their service or thereafter.
19 So they may include compensation for a pension, and that
20 include depression, post traumatic stress disorder related
21 to combat or non-wartime service or secondary to a medical
22 illness.

23 Q And was Officer Nix a former veteran?

24 A Yes.

25 Q And so you have the expertise to evaluate him if

1 you have the records concerning PTSD?

2 A Correct.

3 Q Can you tell me what the symptoms of PTSD are?

4 A That's included in the anxiety section of the
5 diagnostic section of medical disorder. And it requires
6 several features to be met. The first is that the
7 individual be exposed to an even that would cause threat to
8 one's life or severe bodily injury or the integrity of
9 yourself or someone else. And those can be -- range from
10 anything like being raped, being in combat, people who were
11 exposed on 911, airplane crash and there is a whole wide
12 variety of types of incidents.

13 The second thing after exposure is their immediate
14 response has to incorporate either being horrified, feeling
15 helpless, or intense fear for their own life.

16 Now, once those two things are met, and at veterans
17 administration, we try to document the actual experience
18 because they are seeking compensation, so to document an
19 incident they were exposed to. Once that is done, there is
20 a series of symptoms that they would have to meet in order
21 to qualify for the diagnosis.

22 Q Can you tell us briefly what some of those
23 symptoms are.

24 A There is one category called re-experiencing.
25 Typically we think of nightmares, nightmares about the

1 event. Another re-experiencing symptom is flashback, they
2 think they are reliving the actual experience. Interest of
3 memory and thoughts is another re-experiencing, where those
4 memories kind of periodically randomly come into their
5 conscience awareness and are very disturbing. Or have
6 intense psychological stress to an event that reminds them
7 of that situation, such as if a woman was raped in an
8 elevator. Anytime she sees an elevator, she may start to
9 have a rapid heartbeat and remember the incident.

10 The second is group of symptoms is what is called
11 avoidance or psychological numbness and that includes one
12 not wanting to talk or think about it or avoid talking and
13 thinking about it. Some people may result to over use of
14 alcohol to numb the memory. Other people relate to people
15 places or things that remind them. Such as war veteran
16 coming back from a different culture may be reminded of the
17 different ethnicities they saw in battle and it may be
18 disturbing to him, or he may void going to a restaurant.
19 Other symptoms involve withdrawals from close relationships
20 or friendships, lack of interest in activity that you used
21 to enjoy, these are symptoms of depression.

22 And then the third category is hyperarousal, where
23 individuals have trouble with disturb sleep. Either
24 initiating sleep or maintaining sleep. It can be directly
25 related to nightmares, but it doesn't have to be. The

1 second one is irritability or unprovoked aggression.
2 Essentially the individual their arousal is heightened all
3 the time. Instead of having a normal relay of response in
4 some instances, they may respond more impulsively in a
5 shorter time frame. A third is, if I can remember all of
6 them off the top of my head, lack of concentration, lack of
7 concentration is usually distracted. Trying to think of the
8 next one. Those are the three primary ones that we see the
9 most, I would have to look at my manual to think of all the
10 others.

11 And beyond that, it requires that there be some
12 impairment in their functionality either in social,
13 occupational, academic areas, is required for the diagnosis
14 to be provided.

15 Q Okay. And what were you -- you were asked to
16 provide an opinion here in habeas, were you not?

17 A Yes.

18 Q You were also called to act, in addition to being
19 an expert, also to testify as a fact witness as to what
20 happened at the trial, what your scope of assignment was?

21 A Yes.

22 Q Okay. Based on -- what was the question that you
23 were asked for purposes of habeas?

24 A The reasonableness of Officer Nix behavior at the
25 event with Mr. Ruiz.

1 Q And were you able to formulate a conclusion as to
2 whether or not Officer Nix acted as a reasonably prudent
3 officer?

4 A Yes.

5 Q And was your conclusion he did act as a reasonable
6 prudent officer or he did not?

7 MS. DEAN: Your Honor, the State would object to
8 her giving an ultimately conclusion, she is not
9 remotely qualified to do so.

10 THE COURT: Sustained.

11 Q. (By Ms. Brandt) Dr. Kessner, can you provide us
12 with what your qualifications are in term of rendering an
13 opinion in this manner?

14 A Well, as a psychologist one of the things we are
15 trained to do and called upon to do at various times is to
16 evaluate an individual's behavior after an event, whether it
17 is a violent event or attempted suicide. To understand the
18 behavior, for instance, if they are going to be released
19 from the hospital.

20 Q In this particular case, there was a violent
21 event, was there not?

22 A Correct.

23 Q And based on the list of symptoms that you recited
24 for PTSD, did there appear to be certain symptoms exhibited
25 by Officer Nix?

1 A There is only one that I can name based on Officer
2 Nix's behavior.

3 Q And what was that?

4 A The aggression or impulsive aggression.

5 Q And were you able to review any records with
6 respect to determining whether or not he had PTSD?

7 A No.

8 Q Why is that?

9 A I was inform that none were available.

10 Q Who were you informed by?

11 A Cliff Jenkins, the investigator.

12 Q Okay. And so you weren't able to tell one way or
13 the other whether or not Officer Nix had PTSD?

14 A Correct. I would have needed substantial records
15 to examine to determine whether that was the possibility.

16 Q And so if you could not upon whether or not he did
17 not act as a reasonable prudent officer because of some kind
18 of mental illness or psychological condition, were you able
19 to provide an explanation for Officer Nix's behavior in his
20 encounter with Mr. Ruiz?

21 A Yes.

22 Q And what would that explanation be based on?

23 A Well, as a psychologist whenever we evaluate
24 someone's behavior, we always examine or evaluate the
25 context of that behavior.

1 Q And were you able to evaluate the context of that
2 behavior here with Officer Nix in his encounter with
3 Mr. Ruiz?

4 A Yes.

5 Q And tell me what it is that you looked at?

6 A The police videos of the pursuit and the encounter
7 with Mr. Ruiz, the police investigation of the incident, the
8 shooting incident, which included all the officer's
9 statements and witness' statements and standard operating
10 procedure for police pursuit and a barricade suspect.

11 Q And based on that context, in your professional
12 opinion what was your opinion with respect to that, are did
13 he act as a reasonable pursuant officer?

14 MS. DEAN: Your Honor, again I will object that
15 she cannot make the ultimate conclusion here. She has
16 no legal experience. She has no law enforcement
17 experience that she so far has testified to.

18 MS. BRANDT: Your Honor, this doesn't have
19 anything to do with law enforcement experience. It has
20 to do with her experience as a clinical psychologist.
21 She works at V.A., based on what she does every single
22 day, she told you or she has told us that her
23 evaluation is based on the context of his behavior. We
24 are going to go into several other incidents that are
25 here, the realm of various records that she had. So

1 this had nothing to do with being in law enforcement or
2 not. This has to do with her qualifications as a
3 doctor in psychology and she does this evaluation
4 everyday.

5 MS. DEAN: Your Honor if I may --

6 THE COURT: I will sustain the objection.

7 MS. BRANDT: Your Honor, I still like to make a
8 record, if I may?

9 THE COURT: You may.

10 MS. BRANDT: Okay.

11 Q. (By Ms. Brandt) Based on your evaluation, Dr.
12 Kessner, what does Officer Nix's behavior tell us about his
13 encounter with -- his encounter with Mr. Ruiz?

14 A. That it was impulsive.

15 Q. And anything else?

16 A. Well, it wasn't prudent and it did not follow
17 standard operating procedure.

18 Q. And how do you know it didn't follow standard
19 operating procedure?

20 A. I reviewed them and they were very clear.

21 Q. Did you review any other testimony with respect to
22 what other officers did after Officer Nix was shot in terms
23 of approaching the vehicle?

24 A. Included in the summary of the investigation of
25 the shooting was a supervising officer who came to the area

1 after the initial officers had arrived. And he describes --
2 and it is described in the summary -- or in his statement
3 that he could hear that an officer had been shot and the
4 other officers on the scene were discussing whether or not
5 they should rush the suspect vehicle. And he told them not
6 to rush the vehicle that they were to treat this as a
7 barricaded person, barricaded suspect incident.

8 Q And Mr. Ruiz's position hadn't changed any after
9 Officer Nix was shot -- after Officer Nix was shot versus
10 before Officer Nix was shot, was he still a barricaded
11 suspect?

12 A According to all the statements, he was still in
13 his vehicle.

14 Q And so that's what led you to the conclusion that
15 Officer Nix did not act as a reasonably prudent officer
16 because he wasn't acting in accordance with the procedure?

17 MS. DEAN: Your Honor, the State objects to her
18 making ultimately legal conclusion. The officer
19 standard is a legal standard, it is not a psychological
20 standard.

21 THE COURT: Sustained.

22 Q. (By Ms. Brandt) Doctor Kessner, did Officer Nix
23 follow the procedures laid out by the law enforcement
24 manual?

25 A Not according to the descriptions to everyone

1 present.

2 Q And when other officers saw the situation after
3 Officer Nix's death, they followed those procedures; is that
4 correct by not approaching, waiting, because he was a
5 barricaded suspect?

6 A Well, once they were instructed by their superior
7 not to, but the initial arrest --

8 MS. DEAN: State objects to hearsay. If she wants
9 to draw conclusions from what she has read, that's
10 fine; but we are repeating testimony -- repeating
11 statements by supervising officers. I mean this is all
12 in the record, and it doesn't need to be testified
13 here, and it is hearsay.

14 THE COURT: Sustained.

15 Q. (By Ms. Brandt) Did you in the course of doing
16 your evaluation, did you review other encounters between Nix
17 and other individuals?

18 A There were some reports of other incidents,
19 arrests that Officer Nix had been involved in.

20 Q And based on your review of the literature, the
21 professional literature that you looked at, could you tell
22 something about the shooting of Mr. Ortiz by Officer Nix?

23 A That occurred prior to his deployment to Iraq.

24 Q Whose's Ortiz's?

25 A Officer Nix deployment to Iraq.

1 Q To be clear on the record, the shooting of
2 Mr. Ortiz was prior to Mr. Nix going to Iraq?

3 A Yes.

4 Q And what did the review of the professional
5 literature tells you.

6 A It is a study that officers involved in a shooting
7 have a 51 percent chance -- or risk have, a 51 percent
8 chance of being involved in a second shooting within 15
9 years.

10 Q And was the encounter between Officer Nix and
11 Mr. Ruiz within that 15 year?

12 A Fifty-one percent increase chance; and, yes, it
13 was within the 15-year period.

14 Q Does that tell you anything about the situation?

15 A Essentially a risk factor. It doesn't tell
16 anything more about his state of mind at the earlier
17 shooting or anything like that.

18 Q There were several instances or encounters between
19 Officer Nix and other individuals after Officer Nix came
20 back from Iraq; is that true?

21 A Correct.

22 Q And could you list those encounters. And we will
23 talk about them individually. Do you recall an encounter
24 with Mr. Williams?

25 A Yes. That was an adolescent.

1 Q And could you tell me -- that was after Iraq, that
2 was after Officer Nix returned from Iraq?

3 A Correct.

4 Q And is there anything about that incident that is
5 symptomatic of some sort of psychological or emotional
6 condition?

7 A Well, there was some -- what appears to be
8 impulsive behavior.

9 Q Which could be linked to PTSD?

10 A That's correct.

11 Q And do you have any other symptoms with respect to
12 the encounter with Mr. Williams -- between Mr. Williams and
13 Officer Nix?

14 A Well, he intervened when Anthony Williams was
15 already under control of other officers.

16 Q So what we have is another symptom of aggression?

17 A Impulsive aggression on his part in that incident.

18 Q Okay. So this could have indicated some type of
19 emotional problem?

20 MS. DEAN: Your Honor, objection to leading.

21 THE COURT: Sustained.

22 Please don't lead the witness.

23 Q. (By Ms. Brandt) Could you tell us what this could
24 indicate?

25 A Just a piece of information that without any other

1 information attached to it necessarily, but it is a piece of
2 information that is a symptom of PTSD.

3 Q And was there another incident between Officer Nix
4 and Mr. Tobar?

5 A Yes. That involved him and another officer -- a
6 third officer filed a complaint that they essentially
7 manhandled this individual.

8 Q So it was excessive use of force complaint by
9 another officer?

10 A Both of them were, Anthony Williams and the Tobar.

11 Q The Tobar incident was after Iraq; is that
12 correct?

13 A Correct.

14 Q And is there any feature in that encounter between
15 Officer Nix and Mr. Tobar that would indicate any type of
16 possible emotional or psychological problems on the part of
17 Officer Nix?

18 A Well, just the excessive use of force. And the
19 reason I highlighted those two, because those points were
20 made by other officers rather than other civilians, which I
21 didn't want to put as much weight on.

22 Q And those features again could be indicative of
23 PTSD?

24 A It is a symptom.

25 Q A symptom. And would your testimony, having it

1 been used -- well, the trial attorneys asserted self-defense
2 on the part of Mr. Ruiz, would your testimony have provided
3 an explanation to the jury about the behavior of Officer
4 Nix?

5 A I think it would have provided some context.

Q. when you say "context", what does that mean?

7 A Well, to understand behavior, if you know the
8 context. it helps you understand it better.

9 Q Okay. So rather than blaming Officer Nix for what
10 happened, this would have provided an explanation to the
11 jury of the dynamic of what was going on?

12 A I believe so.

13 Q Okay. But the defense attorneys never called you
14 to evaluate this aspect of the case?

15 A T was never asked, it was never presented to me.

MS. BRANDT: I have no further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

18 BY MS. REAN:

20 Q Dr. Kessner, my name is Christi Dean. And I
21 represent the State in these proceedings. We have never met
22 before; is that correct?

23 A Correct.

24 Q How many death-penalty cases have you testified
25 in?

1 A I don't know, 20, 30, maybe more, I am not
2 positive.

3 Q Do you usually testify for the defendant?

4 A I am generally called by the Defense.

5 Q Have you ever testified for the State?

6 A I have been contacted by the State but never
7 worked on a kiss by the State not in a capital case.

8 Q You have been contacted by State to work in a
9 capital case?

10 A Not in a capital case.

11 Q Haven't your range of testimony usually been
12 mitigation and future dangerousness?

13 A There are other areas I have testified in.

14 Q What other areas?

15 A Mental illness, confession.

16 Q And these are in capital cases?

17 A No, not capital cases.

18 Q Can you tell me what you have testified to in
19 capital cases?

20 A Primarily mitigation, risk assessment mental
21 retardation.

22 Q Okay. So, Dr. Kessner, you were a member of the
23 defense team at trial as you stated earlier?

24 A Well, I was called by them to be an expert.

25 Q Okay. And you stated that you only served during

1 the punishment phase?

2 A Correct.

3 Q What did you advise Defense Counsel?

4 MS. BRANDT: Objection, that's work product. That
5 hasn't come out here. She said mitigation. It is a
6 very broad question.

7 THE COURT: Restate your objection.

8 MS. BRANDT: It is overbroad.

9 THE COURT: Overruled.

10 Q (By Ms. Dean) So --

11 MS. BRANDT: Objection, worked product.

12 THE COURT: Overruled.

13 Q. (By Ms. Dean) You can answer the question. What I
14 want to know is, did you serve in an advisory capacity in
15 the defense team?

16 A No.

17 Q You didn't advise them what they should present in
18 mitigation?

19 A Well, I discussed with them the issues I
20 developed, but did I advised them as to who they should call
21 or what process they should take, that wasn't my role.

22 Q Okay. Can you explain to me what your role was?

23 A I interviewed witnesses, looked at records for any
24 theme that might be contained in the information I
25 evaluated, and they asked me to testify on that.

1 Q Okay. Are you aware that the only issues
2 designated for this hearing is ineffective assistance of
3 defense counsel?

4 A I don't know that I was aware of that.

5 Q So effectively you are being asked to give
6 evidence against Defense Counsel; are you aware of that?

7 A I am asked to testify as to what I was asked to
8 do, but I don't consider that I was part of the defense team
9 as far as strategizing and that type of thing.

10 Q Okay. Do you have a copy of your affidavit in
11 front of you?

12 A Yes.

13 Q I want to ask you what directive Lydia Brandt gave
14 you when she hired you for this proceeding?

15 A I believe initially in question whether there was
16 PTSD and what influence that might have had on his behavior
17 at the incident with Ruiz.

18 Q I believe in your affidavit, it says that you were
19 asked to evaluate him under the reasonably prudent officer
20 standard; is that correct?

21 A Well, that was a component of it and if PTSD had
22 any influence on that.

23 Q Okay. Would you please read paragraph seven of
24 your affidavit for the Court?

25 A I have been contacted by Lydia Brandt, Defense

1 Counsel for Wesley Lynn Ruiz, to determine if Officer Nix
2 acted as a reasonable prudent officer would act, in his
3 encounter with Mr. Ruiz had crashed the vehicle and the
4 vehicle driven by other law enforcement --

5 THE REPORTER: Ma'am.

6 A -- who had responded to the scene, if Officer Nix
7 did not act as a reasonably prudent officer, was his
8 reaction in this encounter with Mr. Ruiz because Officer Nix
9 was suffering from post dramatic post disorder. If Officer
10 Nix was not suffering where PTSD, what does the behavior of
11 Officer Nix in this encounter with Mr. Ruiz tell us?

12 Q What I want to know, have you ever received a
13 similar directive in any other capital case you testified
14 on?

15 A I don't know, I am not exactly sure what you are
16 talking about. In other words, on the issue of mental
17 retardation is very specific.

18 Q I mean have you ever received a directive like
19 this one?

20 A Not that I recall.

21 Q So this would be your first time testifying to
22 what a reasonably prudent officer would do?

23 A Using that phraseology, yes.

24 Q Okay. Are you aware that when a suspect sues a
25 police officer for injury, the Court use the reasonable

1 prudent test to determine whether the officer had official
2 to immunity?

3 A No.

4 Q This is a civil standard not a criminal one; were
5 you aware that have?

6 A No.

7 Q Do you work on civil?

8 A I have worked on civil cases for wrongful death
9 but not involving police officers.

10 Q Okay. All right. I think she ran through your
11 qualifications., you have a bachelor degree in social work,
12 master in clinical psychology; is that correct?

13 A Correct.

14 Q And then I want to go over paragraph three of your
15 affidavit where you indicate that, quote, since becoming
16 licensed, I have provided a wide range of services and
17 agencies settings relating to forensic and clinical
18 psychology with juvenile offenders. Does this mean that
19 your practice over the past 15 years has predominantly
20 focused on juvenile offenders?

21 A No. That was earlier in my career before I went
22 into private practice, and so I had about 12 or 13 years of
23 private practical and the last 20 months I have been with
24 the Dallas V.A.

25 Q You did this up -- you primarily focused on

1 juvenile offenders up until 20 months ago when you started
2 working at the V.A.?

3 A No. My training and for my doctoral program
4 focused on adult forensic.

5 Q Okay.

6 A And then after I graduated, I went with the Texas
7 Youth Commission and then Dallas County Juvenile Probation.

8 Q Uh-huh?

9 A Another treatment facility for juveniles before I
10 then went into private practice and where I did evaluation
11 with juveniles and adults, and now I am at the V.A.

12 Q I am not trying to corner you, it looks like from
13 your affidavit that your primary focus has been on juvenile
14 offenders, since you got your SID in '96, you are saying
15 that isn't accurate?

16 A That would not be complete, yeah.

17 Q So you have been working at the V.A. for last 20
18 months?

19 A Yeah.

20 Q Okay. Do you have any law enforcement background?

21 A No.

22 Q Okay. So I guess I would ask you how you are
23 qualified to make a determination about police procedure?

24 A Well, other than evaluating behavior is part of
25 what I do and knowing the context of the behavior that would

1 be the implication.

2 Q Did you make any -- did you draw any conclusions
3 from reading all the, you know, police procedure and the
4 articles that you read that a layperson couldn't draw?

5 A Well, probably not.

6 Q And you didn't have the opportunity to interview
7 Officer Nix first hand?

8 A No.

9 Q Do you usually make posthumous diagnosis?

10 A I did not diagnose him. I said there wasn't
11 sufficient information to do so. And as far as if I would
12 have qualified the fact that I didn't interview him, I would
13 have said there were symptoms that suggested that based on
14 his records. And if he had been diagnosed, if he had the
15 V.A. records and he had been diagnosed, then I would have
16 mentioned that.

17 Q Okay. So in a nutshell, you were unable to
18 determine whether he has PTSD; is that correct?

19 A Insufficient information.

20 Q And then you also concluded that he did violate
21 the police procedure 1200 regarding barricaded suspects?

22 A Based on my reading of the procedures.

23 Q Has that ever been in dispute that he violated
24 that procedure?

25 A I haven't read anything that said it was.

1 Q Would you read paragraph 13, subparagraph B1 of
2 your affidavit?

3 A Senior Corporal Officer Nix was a seasoned police
4 officers, he was not a trainee or a rookie. He had
5 undergone training specific to dangerous traffic stops
6 procedures to follow in the case of a suspect who was
7 barricaded and unwilling to surrender to police.

8 Q I mean would you agree that Officer Nix's training
9 and experience likely informed the decisions that he made in
10 his encounter with Mr. Ruiz?

11 A I would say that that would be my expectation and
12 hope that that would be the case.

13 Q Dr. Kessner, what are your feelings about the
14 death penalty?

15 A I have mixed feelings about the death penalty.

16 Q Can you tell me whether you are for or against it?

17 A I would say I equivocate.

18 MS. DEAN: Okay. No further questions.

19 REDIRECT EXAMINATION

20 BY MS. BRANDT:

21 Q Dr. Kessner, you had said that in your review, a
22 thoughtful layperson could have come up with your
23 conclusion. A thoughtful layperson would not know the
24 symptoms of PTSD, would they?

25 A Correct.

1 Q They might say this looks impulsive, they wouldn't
2 be able to say that this impulsivity is a symptom of PTSD?

3 A Correct.

4 Q When you talk about whether or not Officer Nix is
5 being informed, his behavior, you said that was your
6 expectation, that's what your answer was, it was your
7 expectation; is that correct?

8 A Correct.

9 Q Okay. But based on what you saw, in fact, he did
10 not follow the training; is that correct?

11 A That's correct.

12 Q And even though we are using a reasonably prudent
13 officer, the thrust of what you were asked to do in this
14 case, habeas proceeding, was, one, to determine if rather
15 than blaming Officer Nix, the Defense could have provided an
16 explanation to the jury as to why Officer Nix acted the way
17 he did; is that true?

18 A That's my understanding, yes.

19 Q And so when we are talking about behavior, that is
20 within the scope of your expertise?

21 A Yes. I evaluate police officers in my job
22 everyday. I evaluated preemployment police officers prior
23 to coming to the V.A. is part of what I do.

24 Q And how long did you evaluate police officers
25 before coming to the V.A.?

1 A In my training at Baylor, I had a rotation that
2 that is one of the tasks that we had. In MHMR, I did
3 clinical evaluations. And I have done that in private
4 practice as well.

5 Q Let's go back. How far back was your training at
6 Baylor?

7 A I graduated in '96, so that would have been my
8 second year of training there.

9 Q Okay. And so all of your expertise isn't just
10 with juvenile; is that correct?

11 A Oh, no.

12 Q You said you also have eval'd police officers
13 currently?

14 A Well, it is not unusual for police officers to be
15 veterans, so they come to our clinic as well. But I also
16 have exposure to veterans with PTSD with my training at
17 Baylor.

18 Q So what you were asked to do is consistent with
19 your training; is that correct?

20 A Correct.

21 Q And it is also consistent with what you are
22 actually employed to do right now as a professional
23 psychologist?

24 A Before and during, I mean, yes.

25 Q Okay. And the last question that I have got, you

1 had that same qualification at the time of trial in 2006 to
2 evaluate police officers, because that goes all the way back
3 to the early '90s?

4 A Correct.

5 Q And so you could have provided that to the defense
6 counsel had they asked you?

7 A If they had asked me for, you know additional
8 professional task, I possibly could have provided that.

9 Q But they did not ask?

10 A They did not ask.

11 MS. BRANDT: That's all I have.

12 RECROSS-EXAMINATION

13 BY MS. DEAN:

14 Q I just want to ask two things, bottom line, you
15 could determine whether he had PTSD?

16 A I cannot say, I have insufficient information.

17 Q And then secondary, you conclude that he breached
18 the police procedure; is that correct?

19 A Based on my review of the tape and the procedures
20 and the witness statements of his behavior, that's correct.

21 MS. DEAN: No further questions.

22 THE COURT: You may step down.

23 Why don't we take a ten-minute break at this time.

24 (Recess taken.)

25 (Defendant present in the courtroom.)

(Witness entered the courtroom.)

THE COURT: You may proceed.

PAUL BRAUCHLE

4 was called as a witness, and having been duly sworn by the
5 Court, testified under oath as follows:

DIRECT EXAMINATION

7 BY MS. BRANDT:

Q. Could you state your name for the record, please.

9 A Paul Brauchle.

10 Q Mr. Brauchle, could you tell us how long you have
11 been in practice?

12 A Forty years.

13 Q And what type of practice have you been in the
14 last 40 years?

15 A Criminal.

16 0 Are you board certified?

A I have been for 36 of -- no, 35 of those.

18 Q Were you board certified at the time you were
19 representing Mr. Ruiz?

20 A The trial occurred within the last 35 years,
21 didn't it.

22 O The trial occurred in 2006?

23 A Okay.

Q I'm sorry, 2008, so were you board certified then?

25 A I think I previously answered I have been board

1 certified for 35 years.

2 Q Since when, what date?

3 A That would have been since 1976.

4 Q Okay. What type of practice do you do primarily?

5 A I think I have answered that, but I don't do
6 anything but criminal law.

7 Q Okay. Let me be more specific, do you do capital
8 work?

9 A Yes.

10 Q And you do capital defense work?

11 A I have never been a D.A.

12 Q Okay, you have never been a prosecutor. How many
13 capital cases have you had?

14 A Depends on how you count them, probably between 15
15 and 30.

16 Q Over what period of time, your entire career?

17 A Yeah.

18 Q Could you tell me who was on the defense -- do you
19 know the person sitting next to me?

20 A Yes, ma'am.

21 Q And this is the defendant, Wesley Ruiz; is that
22 correct?

23 A Yes, ma'am.

24 Q Could you tell me who was on the defense team in
25 the trial of Mr. Ruiz for the murder of Officer Nix?

1 A Karo Johnson and Doug Parks.

2 Q And you were also on the defense team too; is that
3 true?

4 A I guess so. I wouldn't be up here if I wasn't.

5 Q Okay. And who were your investigators?

6 A Rex Reynolds.

7 Q Did you have another investigator?

8 A Yeah. We had a Hispanic investigator, his first
9 name is Joe.

10 Q Vela?

11 A Yeah, Joe Vela.

12 Q If I could, do you recall when Mr. Vela was
13 appointed?

14 A He wasn't appointed once we figured out the fact
15 witnesses for the most part --

16 Q I'm sorry, somebody was coughing, I didn't hear
17 you?

18 A He wasn't appointed, we just associated him
19 because we figured out that most, if not all, of the
20 witnesses were Hispanic. And we encountered quite a few of
21 them that didn't speak English, so we needed a Hispanic
22 speaking investigator.

23 Q And so Mr. Vela's assignment was exclusively was
24 to interact and do the investigation with Spanish-speaking
25 witnesses; is that true?

1 A Well, are his assignment was basically to do we
2 told him to do and what Rex Reynolds told him to do. But
3 his purposes in being there was if we needed any Hispanic
4 translation or Hispanic interaction with witnesses.

5 MS. BRANDT: Your Honor, may I approach?

6 THE COURT: You may.

7 Q. (By Ms. Brandt) Let me show you the -- this is
8 already admitted into evidence, it is exhibit -- this is
9 Exhibit 1-C, they are the billing records for Mr. Vela, if I
10 could ask if you would take a look at this for a second, you
11 signed this at the bottom, did you not?

12 A Yes.

13 Q And this was the billing sheet for Mr. Vela; is
14 that correct?

15 A The only thing I can tell you about this, is that
16 that's my signature.

17 Q Okay. And behind it, on this exhibit that has
18 been admitted, this shows a detail list of what he did in
19 the Wesley Ruiz case; is that correct?

20 A I previously answered, the only thing I know
21 anything about is that's my signature.

22 Q Let me ask the question a different way. This
23 corroborate what you just said, he was there to
24 investigate -- to investigate and talk to the various
25 Spanish-speaking witnesses, that's all he did for you, and

1 that was his purpose?

2 A That's basically what he did. But as far as
3 sitting around and keeping track of their hours and what
4 they do or don't do --

5 Q That is nonresponsive to the question. This is a
6 list here of what it is that he did?

7 A And I can't say that it is or isn't.

8 Q But you did sign is that front pay sheet verifying
9 the truth and correctness to the information stated above;
10 isn't that what you signed? Could you read that paragraph
11 right above your signature, could you read it aloud, please?

12 A I, the undersigned attorney, am appointed to
13 represent the above-named defendant and am requesting
14 payment in accordance with the laws of the State of
15 Texas. I further affirm to the truth and correctness
16 to the information stated above and that I have not
17 received any monies or other things of value for said
18 services.

19 Q Okay.

20 A To be paid directly to the investigator.

21 I signed that so he could get pay. I don't know what
22 he did or didn't do for them. I know he worked with Rex
23 Reynolds.

24 Q And the work he did for Rex Reynolds was with your
25 Spanish-speaking witnesses, because we have a Hispanic that

1 you were representing in this case; is that correct?

2 A That's correct.

3 Q Okay. Rex Reynolds provided the bulk of the
4 investigation for non-Hispanic matters; is that correct?

5 A He ah -- yes, I guess that would be a true
6 statement.

7 Q Okay. Did you do the voir dire in the Ruiz case?

8 A I did -- I probably did the greater part of it.

9 Q Okay. And what about the guilt/innocence phase?

10 A My recollection is that I probably did over
11 85 percent of it. You have got the transcript you know what
12 I asked in there.

13 Q Okay. And so it is true that during the
14 guilt/innocence stage, you were in the courtroom all if
15 not -- almost all of the time; is that correct?

16 A I guess that would be a logical deduction.

17 Q The answer is "yes" or "no", were you in the
18 courtroom or not?

19 A I was in the courtroom.

20 Q And were you in the courtroom during the
21 punishment phase?

22 A Yes.

23 Q Do you recall, Mr. Brauchle, whether or not law
24 enforcement was in the courtroom?

25 A In what -- what is the question? There is law

1 enforcement in here right now.

2 Q Do you remember seeing law enforcement in the
3 courtroom in the guilt/innocence phase?

4 A And by "law enforcement," what do you mean?

5 Q Law enforcement, what is law enforcement to you?

6 A Many different things.

7 Q Okay. Tell me what you think law enforcement is?

8 A I guess people that enforce the law.

9 Q Okay. Would they include the bailiffs that are
10 sitting -- individuals from the sheriff's department that
11 are sitting to your right?

12 A That's why I answered your previous question in
13 the way that I did, yeah they are law enforcement.

14 Q Did you see Dallas Police Officers in the
15 courtroom during the guilt/innocence phase?

16 A Yes.

17 Q Did you see Mesquite Police Officers during the
18 guilt/innocence phase?

19 A I don't recall seeing any Mesquite Police
20 Officers.

21 Q I'm sorry, I didn't hear you?

22 A I don't recall seeing any Mesquite Police
23 Officers, but I wasn't really there to count or keep track
24 of the various law enforcement agencies.

25 Q Did you see any Irving Police Officers?

1 A Not that I recall. Like I say, I wasn't making
2 any effort to distinguish that.

3 Q But you would have been aware of police officers
4 were present in the courtroom?

5 A I was very aware of it.

6 Q And what was the number of police officers you saw
7 in the courtroom during the guilt/innocence phase, the total
8 number on any one time?

9 A I never counted them, but there were probably --
10 there were probably at least 50.

11 Q I'm sorry, one-five or five-zero? I didn't hear
12 you, you had your hand over your mouth.

13 A Fifty.

14 Q Five-zero. And that's at one time in the
15 guilt/innocence phase?

16 A They weren't around much during the
17 guilt/innocence phase.

18 Q How many all at one time do you recall seeing
19 during the guilt/innocence phase of law enforcement in the
20 courtroom?

21 A I think I just answered that, probably the most I
22 ever saw was around 50.

23 Q In the guilt/innocence phase in the courtroom?

24 A Well, there were more in the punishment, so there
25 were probably less than that at the guilt or innocence. So

1 it is probably about 30.

2 Q So there were 30 law enforcement in the courtroom
3 during the guilt/innocence phase at one time?

4 A Probably for the final arguments. Like I say,
5 there was almost nobody in here except for D.A.s and
6 relatives during the trial.

7 Q So during the final argument that you made to the
8 jury on whether or not to convict or acquit Mr. Ruiz, while
9 you were giving that final argument to the jurors, there
10 were at least 30 police officers in the courtroom?

11 A I think that would be a fair statement.

12 Q Okay. Do you recall where they were located in
13 the courtroom? I mean, were they -- let me position the
14 courtroom for you so it is clear on the record. Over to
15 your right, which is my left, is the Judge. And so this
16 wall on this side is the right side of the courtroom. We
17 have the back wall, and between the railing and the back
18 wall is the gallery area for the spectators. Where do you
19 recall the police officers being? Were they standing
20 against the right wall?

21 A I don't think the Judge let 'em stand. I think
22 everybody that was in here had to be seated.

23 Q So you believe that there were 30 law enforcement
24 officers in the gallery seated during the closing arguments
25 in guilt/innocence?

1 A That's just a guess.

2 Q That's an estimate, though?

3 A Yeah.

4 Q About 30 of them. And how did you know they were
5 law enforcement?

6 A Because they were down in their dressed blue.

7 Q And did they have badges?

8 A Yes.

9 Q And did they have weapons on them?

10 A I don't really think they did, I don't think they
11 were allowed to have weapons in the courtroom. That wasn't
12 up to me, I wasn't in charge of security.

13 Q Okay. In the punishment phase, how many law
14 enforcement do you think was in the courtroom at one time?

15 A Well, they emptied up a little after the guilt or
16 innocence. I know the chief of police was here.

17 Q The chief of police of what, Dallas, the Dallas
18 Chief of Police?

19 A Yes.

20 Q Okay. And when did he come?

21 A I don't know, I think he was probably here for
22 most of the punishment.

23 Q Okay. And who else, were there any upper level
24 besides the chief of police?

25 A I don't know who would be more upper level than

1 the chief.

2 Q Were any of his assistance there?

3 A Ma'am, I am not a police officer, so I really
4 don't know the hierarchy of the Dallas Police Officers.

5 Yeah, I think there were probably some captains and
6 lieutenants and whatever else the hell they call themselves.
7 There were a lot of police officers down here.

8 Q Do you believe that the police officers at one
9 time in punishment phase, it was more than 30 you said?

10 A Yeah, it was probably around 50.

11 Q Around 50. And were --

12 A There were as many of them in here that they can
13 get without trampling the civilians.

14 Q So the courtroom was packed then; is that a fair
15 statement?

16 A There wasn't an empty seat.

17 Q And the majority of those seats were filled by law
18 enforcement?

19 A That's correct.

20 Q And why -- what is the significance of having law
21 enforcement in the courtroom when a police officer is
22 killed?

23 A I am not the one that invited them down here, so I
24 am not sure on that. I am sure they were trying to show
25 some sort of solidarity for Officer Nix.

1 Q And because they were in the courtroom during
2 closing arguments in the guilt/innocence phase, do you think
3 they were trying to send a message to the jurors?

4 A Of course. They have no other reason to be down
5 here.

6 Q Because they weren't here for security purposes;
7 is that correct?

8 A No, ma'am, they weren't here for security.

9 Q Okay. And what message do you think they were
10 trying to send to the jurors in guilt/innocence?

11 A That they were down here to support Officer Nix.

12 Q And for the jury to come back with a verdict of
13 guilty?

14 A Well, I think that would be what they would be in
15 favor of, yeah.

16 Q Okay. And how about in the punishment phase, you
17 said there were 50 law enforcement officers, again was that
18 maximum number on the day of closing argument?

19 A What do you mean "maximum number"?

20 Q Well, the total number in the courtroom at one
21 time, the most number of law enforcement during the
22 punishment phase was at the closing arguments, or was it
23 about the same throughout the punishment phase?

24 A I am not sure I understand the question.
25 Obviously, the majority of them were down here for

1 punishment arguments. I think it is probably like it was
2 during the guilt or innocence phase, they didn't show up
3 until they thought it was important.

4 Q It was important to do what, send a message?

5 A If that was what they were trying to do by coming
6 down here, which I think it was, yeah, that's what I think
7 they considered important.

8 Q So they were here in the punishment phase to send
9 a message to the jury so that a death verdict would be come
10 out of the punishment phase; is that true?

11 A I didn't talk to any of them. I didn't invite
12 them down here. I would assume, though, using common sense,
13 which you don't seem to have much of, that's why they were
14 down here.

15 Q Okay.

16 A Why would you think they would all converge at a
17 capital murder trial?

18 Q I am asking the questions, Mr. Brauchle --

19 A Not very well, thank you.

20 Q There was an issue that you raised concerning
21 missing audio portions; do you recall that?

22 A Yes.

23 Q Could you tell me what you recall about the
24 dispute?

25 A Could you ask me a specific question.

1 Q I'm sorry?

2 A Could you ask me a specific question?

3 Q Yeah. There was an objection that you had raised
4 concerning the audio transmissions between law enforcement,
5 between and among law enforcement, the dispatchers and all
6 that; do you recall that?

7 A An objection.

8 Q Did you file a motion, Mr. Brauchle?

9 A Probably about 60 or 70 of them. What are you
10 referring to?

11 Q Do you recall on May 16th that there was a hearing
12 because you alleged that the State had turned over data
13 about the encounter between Officer Nix and Officer Ruiz
14 (sic), but it was missing the audio?

15 A Well, that was upon a contention from the time
16 that we figured out the police department had destroyed the
17 audio portions of the -- of the incident.

18 Q When did you figure out that they had destroyed
19 the audio?

20 A When that discovery was made available to us.

21 Q Do you recall when you first requested the audio?

22 A We started requesting items from the State from
23 the first day I was appointed, but the State didn't always
24 comply with our request. When they finally --

25 Q Well, hang on a second, you made a lot of

1 requests, didn't you?

2 A Yes, I did.

3 Q Okay. So my question to you is when did you first
4 make a request for the audio recordings of the State, if you
5 remember?

6 A I have no idea.

7 Q You don't remember. Do you recall the May 16th
8 hearing?

9 A In regard to what?

10 Q The missing audio and the allegations about the
11 destruction of the audio?

12 A If there was one held on that day, I guess I
13 recall it, I think that we probably brought that up on more
14 than one occasion.

15 Q Okay. And following the hearing, is it -- do you
16 recall filing a Motion to Dismiss or Preclude the Imposition
17 of the Death Penalty?

18 A I do.

19 MS. BRANDT: Your Honor, may I approach?

20 THE COURT: You may.

21 Q. (By Ms. Brandt) Let me show you this -- let me
22 show you this, please, if you would take a look at it. Is
23 that the motion that you filed to -- after the hearing?

24 A It would appear to be.

25 Q Could you take a look at this paragraph to help

1 you refresh your recollection.

2 A Okay.

3 Q Okay. And could you tell us again -- let me ask
4 the question again, what was the dispute about?

5 A What dispute?

6 Q I'm sorry, you said what dispute?

7 A Yeah. You asked me what the dispute was about,
8 and I asked you what dispute.

9 Q The dispute in this motion?

10 A The motion doesn't have a dispute. The motion
11 request relief from the Court.

12 Q Okay. Let's take a look at the first paragraph,
13 could you read that into the record?

14 A The defendant is indicted for the offense --

15 Q No, this one right here?

16 A The one marked two not one?

17 Q That's correct. Could you read that into the
18 record?

19 A The document speaks for itself.

20 Q Well, could you read that into the record so that
21 everyone here is clear as to what we are talking about?

22 A You can read it to them.

23 MS: BRANDT: Your Honor, could you ask the witness
24 to please read it into the record.

25 THE COURT: Mr. Brauchle, if you will please read

1 the requested paper into the record.

2 A Defendant has requested that the State produce
3 the audio recordings of all police radio traffic from
4 all channels from approximately 30 minutes prior to
5 the commission of the alleged offense until Mr. Ruiz's
6 arrest.

7 At a hearing on May 16th, 2008, it was learned
8 that this had been no request made by law enforcement
9 to preserve recording that are routinely erased after
10 30 days, therefore radio transmission which could have
11 had a direct bearing upon Mr. Ruiz's claim of
12 self-defense has been destroyed.

13 Q (By Ms. Brandt) And so that was the conflict that
14 was the subject of the hearing; is that correct?

15 A No. What the hearing was about is, is that once
16 the State finally complied with our request for discovery,
17 and we were given the video and audio recordings of the
18 offense that Mr. Ruiz was on trial for, we figured out that
19 the State -- not the State, but the police department had
20 erased their part of the radio transmission. And that we
21 could not recover it. Although they denied having erased
22 it.

23 Q Okay. And why were those radio transmissions
24 important to you in the defense of Mr. Ruiz?

25 A Because it would have given the in-car messages

1 back and forth between, I think there were five cars in
2 pursuit of Mr. Ruiz. It would have contained the officer's
3 comments, statements, expletives, what have you. And there
4 is a 30-minute gap of silence during the critical part of
5 the events that occurred that day.

6 Q In --

7 A Especially from Officer Nix.

8 Q In -- would that audio have shown what his state
9 of mind was?

10 A I certainly think it would have.

11 Q And if law enforcement had testified on the record
12 that Officer Nix was issuing commands, that audio would have
13 corroborated or conflicted with if all he was doing was
14 issuing commands?

15 A Well, his fellow officers didn't in any way imply
16 that he was being anything other than supercourteous to
17 Mr. Ruiz.

18 Q If you had had those audios, you could have shown
19 to the jury that Officer Nix was using expletives?

20 A Well, Mr. Ruiz testified to that. And of course
21 it would have undercut the State's posture that nothing bad
22 out there happened except to Officer Nix.

23 Q And so essentially without that, Ruiz's testimony
24 was left to look very self-serving; is that true?

25 A I don't know that it was self-serving, I thought

1 it was the only testimony that accurately showed what
2 happened out there.

3 Q Okay. But if you had had those audios, there is
4 nothing more powerful than the actual words of Officer Nix
5 himself; is that true?

6 A I would think that if we would have had those,
7 this hearing probably wouldn't be being held.

8 Q Okay. And in addition to showing whether or not
9 Officer Nix used expletives, those audios could have also
10 shown out of the mouth of Officer Nix if he was threatening
11 Mr. Ruiz; isn't that true?

12 A If he was, yeah, they would have. And I think, I
13 am led to believe that he was.

14 Q And what those audios could have also have shown
15 was his state of mind in that his tone of voice could have
16 shown whether or not he was angry; is that true?

17 A I think the silent video shows that Officer Nix
18 isn't out there asking Mr. Ruiz to please roll his window
19 down. It is pretty graphic as to the fact that Officer Nix
20 had lost it at some point.

21 Q But again the best evidence of Officer Nix's state
22 of mind are the words from Officer Nix?

23 A If those existed, they would be, yes.

24 Q They would be very powerful for a jury to hear?

25 A Well, I assume that they would be, and I certainly

1 hope that they would be; but since they are not -- since the
2 police --

3 Q Thank you, Mr. Brauchle, answered the question.
4 What law enforcement had testified to, is that they had
5 turned over all the recordings that they were able to
6 extract from the server. As an experienced criminal defense
7 lawyer, would you have wanted to do an independent analysis
8 of that original source material?

9 A If it were available.

10 Q Okay. And so whether you are a prosecutor for the
11 State of Texas or you are a Defense Attorney, if someone
12 from law enforcement says I extracted all the recordings,
13 you are not just going to take their words for it; is that
14 true?

15 A I believe that we sent our discovery to a sound
16 lab here in Dallas, as well as one in Arlington, trying to
17 find if there was anything there other than silence.

18 Q But those were based on copies; is that correct?

19 A I think we were tendered the -- what were
20 allegedly the originals at one time.

21 Q Well, let me show you -- do you have any
22 independent recollection of the officer saying that the
23 original source was destroyed?

24 A Well, they came up with two or three different
25 versions. One was is that one of the channels didn't work;

1 one of the channels was new, and didn't report; and the
2 other was, is that it must have been magic or something.
3 You know.

4 Q So what you really needed was the original to do
5 the analysis on?

6 A Well, I think that they tendered us something that
7 they vouched for as being the original. I mean, it would be
8 a video -- a video out of the in-car camera.

9 Q But as far as the channels of the officers
10 communications back and forth, those were captured on the
11 server at city hall; do you recall that?

12 A Well, some of the police said that, no that --

13 Q Do you recall that, Mr. Brauchle?

14 A You want the answer or do you want to answer with
15 me.

16 Q I want you to answer the question, do you recall?

17 A What?

18 Q That the communications on the channels other than
19 channel five were captured on the server at city hall?

20 A I don't think anybody ever said that.

21 Q Okay.

22 A The ones under the --

23 Q Thank you, Mr. Brauchle, you answered my question.

24 MS. BRANDT: Your Honor, may I approach?

25 THE COURT: You may.

1 Q. (By Ms. Brandt) Let me show you this volume and
2 ask you if you can identify that, please. What are you
3 looking at?

4 A. Volume 40 of 59 volumes.

5 Q. Of what?

6 A. Pretrial hearing.

7 Q. Of what, this is the reporter's record; is that
8 correct?

9 A. Yeah.

10 Q. And this is in the Ruiz's trial -- in Mr. Ruiz's
11 trial?

12 A. It is captioned that, yes.

13 Q. And what we have here, could you read this aloud
14 for me please. You said you didn't recall it being -- the
15 communications being captured on the server, this is the
16 testimony of Brock Richardson?

17 A. (Witness complies.)

18 Q. Let me point out over here to you, could you read
19 this for me, please, into the record?

20 A. I am not going to read one sentence out of
21 context, I am seeing what was asked before and after.

22 Q. Okay, I will let you take a look at it.

23 A. Thanks.

24 Q. You are welcome.

25 MS. SHIN: May we ask which page you are reading.

1 MS. BRANDT: We are looking at page 39 of volume

2 40.

3 MS. SHIN: Okay.

4 A What was the question.

5 Q (By Ms. Brandt) Okay. On page 39, because you
6 said you didn't remember where the information was being
7 recorded. And so do you recall on page 39 they asked where
8 those audios communications were being recorded? And so do
9 you recall now where those communications between the
10 various officers over their channels, not the main channel
11 but when they switched over to the alternate channel, where
12 were they being recorded?

13 A Well, they were supposed to be recorded at city
14 hall; but if you read further down, it says that they
15 weren't.

16 Q If you look on page 39, it asks, they are dual
17 recording systems, and it says one main server that records
18 all of it. Both of us have access to it. And they asked
19 where is it located. So the record does say it was located,
20 server, in city hall; is that correct?

21 A Yes. But if you read on --

22 Q All right. Thank you, Mr. Brauchle, that's all I
23 asked?

24 A And I am going to complete the question.

25 Q Mr. Brauchle, I have asked you?

1 A And I am going to complete the answer.

2 Q You can complete the answer.

3 A Now, then, Lieutenant Crawford contacted you the
4 next day and told you that they had some problems with
5 retrieving communication.

6 ANSWER: Retrieving the information, the 911 calls and
7 the radio traffic off the NICE, which is the new recording
8 system which we had just put it had initially been installed
9 a month earlier. So they had implied to you that someone
10 had tried to download that information; is that correct? He
11 had tried to find it?

12 Yes, sir.

13 Q Okay. So they are the ones who had tried to
14 download the information, it was those individuals over at
15 city hall, the law enforcement over there, and they weren't
16 able to do it?

17 A That would be a correct statement.

18 Q And they may not have been able to do it because
19 they didn't have the training perhaps, we don't know what
20 their training was?

21 A They might not have been able to do it because it
22 had already been destroyed.

23 Q Or they may not have been able to do it because
24 they weren't qualified, that's another option; is that true?

25 A There is a myriad of reasons why it may or may not

1 have been there.

2 Q I'm sorry, I didn't understand the answer?

3 A There is a myriad of reasons why it may or may not
4 have been done.

5 Q And so what we also see on here is that 30-days
6 after the information was originally made. the encounter
7 between Mr. Ruiz, it was erased. So the information on the
8 original server was no longer available to you; is that
9 correct?

10 A Were you not listening when I answered your
11 question a while ago. Here on page 349, it said the day
12 after it happened, they didn't have it. So 30 days has
13 nothing to do with it.

14 Q Well, on page 51 it also says --

15 A You bring me page 51 and I will see what it says.

16 Q Okay. On -- on page 51, do we have Brock
17 Richardson testifying, the audio information -- this is your
18 question: The audio information that you retrieved that
19 day, before or after the time of the shooting, does any of
20 that information still exists? You are the one who was
21 doing the questioning in that hearing; isn't that true?

22 A I am trying to see if in fact this is still Brock
23 Richardson. And what page are you referring to?

24 Q Fifty-one. And his testimony starts on page 37.
25 And you are Mr. Brauchle that was at that hearing; isn't

1 that true?

2 A Go on.

3 Q So on page 51, you asked Mr. Richardson, the audio
4 information that he retrieved, that's the information that
5 he retrieved that day, before or after the time of the
6 shooting, did any of that information still exist. And his
7 answer was, No, sir, we only keep that information for 30
8 days.

9 A Where are you seeing that?

10 Q At the very bottom, the last question and answer
11 on page 51?

12 A That's what --

13 Q That's what he said. You asked that question.
14 And what he said was, after 30 days, the original source was
15 no longer available to you as the defense lawyer; is that
16 what that says?

17 A Well, previous to that, he says that he didn't
18 make the exhibit that we were talking about. So picking
19 sentences out of it is no --

20 Q Okay. But what he testifies to here is that --

21 A In one sentence he testifies to what you said.

22 Q Okay.

23 A I think you need to take the testimony completely.

24 Q Is it true, Mr. Brauchle, that it is general
25 knowledge among individuals who practice law, the defense,

1 criminal defense, the state attorneys that communications
2 between suspects and law enforcement would be recorded?

3 A We didn't have that in this case.

4 Q In 2006 the communications were coming in over the
5 channels, weren't they?

6 A Not between suspects and police.

7 Q Well, how about among all the police officers and
8 the dispatchers?

9 A We had reasons to believe that, yes, they were;
10 but we didn't have anything that showed that they were.

11 Q So they were being recorded in 2006 during the
12 event of this offense?

13 A Not according to the Dallas Police Department.

14 Q Well, not according to the Dallas Police
15 Department, but it is common knowledge that these
16 transmissions between law enforcement officers are recorded;
17 isn't that true?

18 A In most jurisdictions.

19 Q And here in Dallas County that is true?

20 A Well, not in this case.

21 Q Well, we don't know that, we only know what the
22 officers said. He couldn't retrieve them. So isn't that
23 true, he said he couldn't retrieve them?

24 A Well, I don't know --

25 Q That's what his testimony was, that he could not

1 retrieve them; isn't that true?

2 A I would like to look at the testimony.

3 Q Okay. And is it true that these recordings are
4 routinely erased after 30 days?

5 A I can't speak to that.

6 Q Well, let me show you -- you have no recollection
7 of that at all?

8 A You asked me is it true that recordings are
9 destroyed after 30 days. I can't --

10 Q I said that they are routinely destroyed after 30
11 days?

12 A In which jurisdiction are we talking about?

13 Q We are talking about here in Dallas County?

14 A Well, that includes about 30 cities.

15 Q We are talking about in the Ruiz's case; is that
16 true?

17 A I think Mr. Ruiz's communications were destroyed
18 the day that they were made. I don't think that there is
19 any 30 days B.S. in regard to this.

20 Q Let me have you take a look, that is the motion
21 that you had just identified previously. In the Motion to
22 Dismiss or Preclude Imposition of Death Penalty for Failure
23 to Preserve Evidence, you identified this as your signature
24 on here; is that correct?

25 A Yes.

1 Q And in there on paragraph two that you just read,
2 you said that at a hearing on May 16th, 2008, it was learned
3 that there had been no request made by law enforcement to
4 preserve recordings that are, quote, routinely erased after
5 30 days, those are your words.

6 A And that's what -- those aren't my words, those
7 are the words of the police that came down here and
8 testified.

9 Q This is what you wrote in your pleading, that they
10 are routinely erased after 30 days. So if the recording was
11 made May 23rd of 2007, 30 days after that, they would have
12 been erased in Mr. Ruiz's case; is that true?

13 A I will repeat what I just got through saying, I
14 think they were erased the day that this happened.

15 Q But you don't know that for a fact?

16 A There is somebody somewhere that knows what
17 happened. But I don't think anybody knows what happened.

18 Q Well, what we have that we know that happened what
19 was testified at the evidentiary hearing, and you just read
20 page 51 that said the recordings were erased after 30 days.
21 So the original source material, that original server that
22 had captured the audio transmissions among the law
23 enforcement officers was erased after 30 days; is that true?

24 A That's not the answer that I gave previously.

25 Q Okay.

1 A And that is not reflected in the record.

2 Q All right. Could you tell me, Mr. Brauchle, what
3 the date of the offense is?

4 A I think it was some time in March.

5 Q March 23rd, 2007, does that sound right?

6 A That's the date, it sounds right.

7 Q Okay. And so 30 days after that would be
8 April 22nd, 2007?

9 A I guess.

10 Q You guess. Let me show you a calendar.

11 A Look, if you say it's 30 days, it's 30 days. I
12 don't need to see a calendar.

13 Q You would agree with me it would be April 22nd
14 would be 30 days?

15 A If that's significant, yes.

16 Q Okay. And do you recall when the first written
17 Motion for Discovery, Production, Inspection of Evidence
18 Number One was made by you?

19 A No.

20 Q Okay. You have no independent recollection of the
21 date?

22 A You got to be kidding.

23 Q Okay. Let me show you -- could you take a look at
24 this, please.

25 A It's volume one of two.

1 Q Of the clerk's record of Mr. Ruiz's trial; is that
2 correct?

3 A Of the what?

4 Q Of the clerk's record in Mr. Ruiz's trial?

5 A That's what it says on it.

6 Q Okay. And that's what it says?

7 A Uh-huh.

8 Q Okay. You agree do that. And here we have got a
9 motion that says it is number one. So this is the first
10 written Motion of Discovery, Production and Inspection of
11 Evidence that was filed by you; is that correct? It is
12 listed number one.

13 A I don't know that the number one denotes any
14 particular sequence. I think the day that they are file
15 stamped, put in the court's record would be most important.

16 Q But you labeled it as number one as your first
17 motion. The pleadings speak for itself.

18 A My secretary labeled it number one.

19 Q But you signed it, didn't you? Let's take a look.
20 On page, ah, on page 71 of the clerk's record, that's your
21 signature, isn't it?

22 A Yeah.

23 Q Okay. And that's dated December 6th of 2007; is
24 that correct?

25 A Yeah.

1 Q Okay. So we have the first written motion filed
2 December 6th, 2007, that was signed by you, requesting the
3 production of documents in evidence?

4 A That doesn't mean that that is the first request
5 for discovery.

6 Q Could you tell me, did -- did you make any
7 requests to preserve that original audio of the State in the
8 first 30 days?

9 A I don't believe.

10 Q Okay. So did you instruct your investigator to go
11 down and get ahold of the original source of those audios on
12 the server in the first 30 days from March 23rd to
13 April 22nd of 2007?

14 A Well, as I told you, I don't think there was any
15 originals left.

16 Q It doesn't matter. What I am asking you, did you
17 make a request to preserve or obtain the original source of
18 those audio recordings in the first 30 days?

19 A Not that I know of.

20 Q So you didn't ask the Judge to enter a court order
21 asking law enforcement to preserve that data; is that
22 correct?

23 A If there is none in the file, I did not.

24 Q Okay. And let me -- just to be sure, let me show
25 you a copy of your billing records. This is what you

1 submitted for payment. You would agree that you were -- you
2 were appointed on March 29, '07 to represent Mr. Ruiz, so
3 that was six days after the offense?

4 A Actually I was appointed before then.

5 Q Well, if the --

6 A Cause I went to see Mr. Ruiz while he was still in
7 the hospital.

8 Q But if the record indicates that you were
9 appointed 3/29/07, would that be good enough for you?

10 A Yeah.

11 Q Okay. And do you see anywhere in the first 30
12 days, this is a listing of the time and tasks that you did
13 and submitted for payment to the auditors office. And it
14 begins on March 29, of 2007 and it continues all the way
15 into -- it ends July 7 of 2008; would you agree to that,
16 that's what you submitted to the auditors office?

17 A And your question is?

18 Q Is this what you submitted to the auditors office
19 for payment?

20 A I have never seen this before, so I don't know
21 what it is.

22 Q Well, this is certified by the auditors office, it
23 is a business record affidavit?

24 A Okay. The question is what now?

25 Q During the first 30 days, just to confirm, there

1 is nothing in there where a request was made to preserve or
2 obtain the original source of the audio recording; is that
3 true?

4 A No, I think that --

5 Q Do you see anything in there that is written where
6 you are requesting the preservation or access to the
7 original source material of those audio recordings at city
8 hall?

9 A No, there is conferences on March 29th and
10 April 24th.

11 Q Well, what conferences are they, do you have any
12 independent recollection?

13 A Yes, it's appointment conference, Judge, D.A. and
14 coordinator, I would have asked the D.A. for discovery at
15 that point. And then on April 24th, it says conference with
16 D.A. and grand jury subpoena, that would have been
17 conferences, discussion on that date.

18 Q Could you tell me, did you get a court order from
19 the Judge?

20 A In regard to what?

21 Q Obtaining or preserving the original access to the
22 city hall server material?

23 A Well, I have answered both parts of that.

24 Q The answer is, no. I think you want --

25 A You want my answer or your answer.

1 MS. SHIN: Objection asked and answered.

2 THE COURT: Overruled.

3 Q. (By Ms. Brandt) The answer is already, no?

4 A No, I didn't answer, no.

5 Q Let me show you the billing records for Rex
6 Reynolds, you said he was your investigator?

7 A Uh-huh.

8 Q Do you see anything in there between, from the
9 first 30 days which is March 23rd to April 22nd, where he
10 tried to obtain access of the original source of those audio
11 at city hall. And I am looking at Exhibit 1-B, Mr.
12 Brauchle's billing records that we were just looking at is
13 State's Exhibit 1-A -- Defendant's Exhibit 1-A. Do you see
14 anything in there where Mr. Reynolds was going down with a
15 subpoena or court order?

16 A You would have to ask Mr. Reynolds about that.

17 Q Okay. but you signed his pay sheets here, like you
18 did with Mr. Vela?

19 A And I will answer it the same way. When they
20 present a pay sheet I sign it. I am not the auditor.

21 Q Okay, but do you instruct the investigator, give
22 them direction on what to do?

23 A I have already answered that, yes.

24 Q Okay. Mr. Brauchle, do you go to the continuing
25 legal education seminars for capital defense lawyers?

1 A Yes.

2 Q And are you aware of the Texas Capital Guidelines?

3 A Yes.

4 Q And do you know what guideline 11.1 concerning
5 trial investigations says?

6 A Why don't you show it to me.

7 Q I'm sorry, I didn't hear you?

8 A Why don't you show it to me, since you seem to
9 know what it is.

10 Q Let me give you a copy of that.

11 MS. BRANDT: Judge, do you want a copy?

12 Q. (By Ms. Brandt) First of all, could you take a
13 look at what the date of adoption of these are at the
14 bottom?

15 A Uh-huh.

16 Q That says they were adopted April 21 of 2006; is
17 that correct?

18 A It would appear so.

19 Q So those would have been the operatives,
20 guidelines as of the date of the trial of Mr. Ruiz; is that
21 true?

22 A Of the trial, yeah.

23 Q Okay. And they would have governed the standard
24 of care that was applicable to you; is that true?

25 A After April 21st, yes.

1 Q Okay. So this trial was held in 2008, so it was
2 applicable -- it was the applicable standard of care to your
3 representation of Mr. Ruiz at his trial in 2008?

4 A In what regard?

5 Q In regard to what these guidelines set out?

6 A What's your question?

7 Q Okay. Take a look with me on guideline 11.1?

8 A Uh-huh.

9 Q Are you there?

10 A Yeah.

11 Q And if you would look at A-2-B, and let me read
12 this into the record.

13 It says informal discovery request before a document
14 if possible should be immediately made to law
15 enforcement and the District Attorney for witness
16 statement, police reports, physical evidence, names of
17 codefendants, and so on and so forth.

18 The audio would have been physical evidence,
19 wouldn't it?

20 A Yes.

21 Q Okay. And you have already told us that you did
22 not make any of those requests in the first 30 days?

23 A No, I told you that I met with the D.A. on at
24 least two different occasions.

25 Q You told me that met with the D.A. But you didn't

1 tell me that you in fact came out with a court order or that
2 you even made an actual request; is that true?

3 A No, I told you that I made request for discovery
4 on those two occasions.

5 Q But we don't know what that discovery was?

6 A I do.

7 Q Okay. But there is nothing in the record here
8 that shows specifically what that discovery is?

9 A How would there ever be a record of me meeting him
10 in his office.

11 Q Ah, let me ask you a question, when -- is the
12 District Attorney required to turn over everything to you
13 that isn't work product, you just have to sit there and wait
14 or do you have to do something?

15 A What do you mean by their work product?

16 Q Well, if you want physical evidence, do they just
17 turn it over to you or is there something that you have to
18 do in order to trigger them turning it over?

19 A Once it is brought from the investigating agency,
20 they turn it over to us --

21 Q Okay.

22 A -- when they get it.

23 Q And the State of Texas, or the prosecutors would
24 have access to that city server; is that true?

25 A Can't speak to the D.A.'s office.

1 Q That wasn't their work product is my point, that
2 city server wasn't their work product, it wasn't protected
3 by their work product privilege?

4 A I don't understand the question. Work product --

5 Q Were you able to get access to that city server,
6 had you asked for it?

7 A I am certain that I would not have.

8 Q Would you have needed a court order to get access
9 to it?

10 A I wouldn't have got access even with that.

11 Q Would you have subpoenaed it?

12 A I think we are talking about a rather large
13 computer.

14 Q But we are talking about access to the server on
15 which the audio was captured?

16 A And I think if you read the testimony at the
17 trial, it says that it wasn't captured.

18 Q Well, he said he couldn't retrieve it, that's a
19 different testimony?

20 A I think being able to --

21 Q Let me ask you.

22 A Let me answer the question.

23 Q Mr. Brauchle, I am asking the question.

24 A Not very well. And I am not --

25 Q Could we declare him a hostile witness?

1 A Please do, I think I have already shown that.

2 THE COURT: The Court will declare Mr. Brauchle a
3 hostile witness.

4 Q. (By Ms. Brandt) Would you please just answer the
5 question that I have asked. My question to you is, did the
6 State of Texas do anything to prevent you access from that
7 original source material?

8 A Did the State?

9 Q Yes. Did the D.A. do anything to deny you access
10 to that material?

11 A They didn't know where the material was any more
12 than I did.

13 Q So the answer to the question is, no, they did
14 nothing to prevent you from having access to that material
15 during the first 30 days?

16 A Well, once again --

17 Q The question is, "yes" or "no"?

18 A No, it is not "yes" or "no". The evidence didn't
19 exist so they couldn't keep me from it.

20 Q Well, what he testified to is, he couldn't
21 retrieve it?

22 A And if you can't retrieve it, it is not there.

23 Q Well, that's why you hire an independent expert to
24 make that determination, isn't it. Isn't it? That's the
25 point, we don't take law enforcement word for it?

1 A And I don't.

2 Q Okay. So that's the reason why you would have
3 needed access to the original source material, because you
4 would not want to have wanted to take law enforcement word
5 for it?

6 A You are assuming facts not in evidence.

7 MS. BRANDT: Your Honor, I have no further
8 questions at this time.

9 THE COURT: Let's take a ten-minute break.

10 (Recess taken.)

11 (Defendant present in the courtroom.)

12 MS. BRANDT: Your Honor, I have one question that
13 I had omitted. It was on my list and I didn't get to
14 it. Could I just ask the witness and pass it over to
15 the D.A.

16 THE COURT: You may.

17 Q. (By Ms. Brandt) Mr. Brauchle, my only question,
18 there was no way to find out what the words were by getting
19 a lip reader to find out everything that Officer Nix was
20 saying, or do you recall?

21 A Well, the people that -- the officers that were
22 inside their cars, their faces weren't visible. And quite
23 possibly a lip reader may or may not have been able to
24 determine what Officer Nix was saying, I really don't know,
25 because the closes camera or the camera that showed Officer

1 Nix was quite a distance from him.

2 Q Okay. Thank you. You answered my question.

3 MS. SHIN: The State has no question.

4 THE COURT: You may step down, sir.

5 MS. BRANDT: Your Honor, he is excused from this
6 end.

7 THE COURT: You are free to leave or remain in the
8 courtroom if you wish.

9 THE WITNESS: I will be back.

10 MS. BRANDT: We would like to call Rex Reynolds,
11 please.

12 (Witness entered the courtroom.)

13 THE COURT: You may proceed.

14 EXCEL REX REYNOLDS

15 was called as a witness, and having been duly sworn by the
16 Court, testified under oath as follows:

17 DIRECT EXAMINATION

18 BY MS. BRANDT:

19 Q Could you please state your name for the record?

20 A Excel Rex Reynolds.

21 Q Mr. Reynolds, could you tell me what you do for a
22 living?

23 A I'm a private investigator.

24 Q And how long have you been doing that?

25 A Since 1996.

1 Q And were you the private investigator in the case
2 of the State of Texas versus Wesley Ruiz?

3 A Yes.

4 Q And did you take your directions from Paul
5 Brauchle?

6 A Beg your pardon?

7 Q Were you directed to do the investigation by
8 Mr. Paul Brauchle?

9 A Yes, ma'am.

10 Q Do you recall the dispute over the erased original
11 source of the audio, there was that dispute. This was a
12 hearing and there were motions; do you recall that dispute?

13 A Would you repeat your question, please.

14 Q Yeah. There were audio recordings about the
15 communications between and among different law enforcement
16 up to the time of the encounter between Officer Nix and
17 Mr. Ruiz?

18 A Yes, ma'am, I was somewhat involved in that, yes.

19 Q Could you tell me what your involvement was?

20 A I had gone soon after Mr. Brauchle brought me into
21 the case.

22 Q When did he bring you into the case?

23 A April 10th of 2008.

24 Q Could it be perhaps April 4th of 2008 -- go ahead.

25 A I thought it was April 10th.

1 Q Of 2008?

2 A Yes, ma'am.

3 Q And what did you do in April 10th, 2008?

4 A I went to, what is his name, Karo Johnson's office
5 and picked up what I call discovery material and started
6 reading.

7 Q Okay. And was that for the hearing on May -- in
8 May of 2008 on the problem with the missing audiotapes?

9 A That wasn't my reason for reading, no, it wasn't.
10 I was reading to basically familiarize myself with the case.
11 And then the issue came up about the missing audio portions
12 of the videotapes.

13 Q And what was the first date that was, please?

14 A What was the what?

15 Q What was the first date that that happened?

16 A That was mentioned?

17 Q Yeah.

18 A It would have been some time shortly after that,
19 exact date, I can't tell you.

20 Q But it wasn't until April of 2008 that this issue
21 of the missing audio, the original source material came up?

22 A To my knowledge, yes.

23 Q Okay. Do you recall when you were first appointed
24 by the Judge or first appointed to the case as the
25 investigator?

1 A Don't remember.

2 MS. BRANDT: Your Honor, may I approach?

3 THE COURT: You may.

4 Q. (By Ms. Brandt) Let me show you your billing
5 records. And this is Exhibit 1-B for the record, this has
6 the business record affidavit to it. Does that look like
7 your signature in what you submit, I will give you a few
8 minutes to take a look at it?

9 A My signature is not on here but this is me.

10 Q Okay. And is this your printout of the services
11 that you performed?

12 A Yes, ma'am.

13 Q For the investigation in Mr. Ruiz's case?

14 A Yes, ma'am.

15 Q And what is the first date that is listed?

16 A 4/4/07.

17 Q So as far as you recall the first time you came in
18 was April 4th of 2007?

19 A I see how this happened, because I looked back
20 through my records and I missed the first portion.

21 Q Okay.

22 A So it would have been 4/4/07.

23 Q Okay. But with respect to the first 30 days that
24 you listed here, you don't see any work that you did as far
25 as trying to preserve or obtain the original source material

1 for those original audio recordings?

2 A Can you give me just a moment.

3 Q Sure, I would be happy to.

4 A It may have been this 3/12/08 I see that I
5 contacted Sergeant Rick Guzman at DPD.

6 Q And was that done under the direction of Mr.
7 Brauchle?

8 A I beg your pardon?

9 Q And was that done at the direction Mr. Brauchle?

10 A It would have been done at his direction.

11 Q And that would have been the first time that you
12 would have been directed to do the inquiry into the missing
13 audio portions?

14 A Yes, ma'am.

15 Q And nothing in the first 30 days on this record
16 that you provided to the auditor to collect your bill, there
17 was nothing in there where you did any type of investigation
18 or work on the missing audio?

19 A No, ma'am.

20 MS. BRANDT: Thank you, I have no further
21 questions.

22 THE COURT: Any questions from the State.

23 MS. DEAN: Your Honor, the State has no questions.

24 THE COURT: You may step down, sir.

25 MS. BRANDT: I would like to call Karo Johnson.

1 THE COURT: Any objections to Mr. Reynolds being
2 released?

MS. BRANDT: I have no objections.

MS. DEAN: None.

THE COURT: You are free to leave, sir.

(witness entered the courtroom.)

THE COURT: You may proceed.

WILLIAM E. "KARO" JOHNSON

9 was called as a witness, and having been duly sworn by the
10 Court, testified under oath as follows:

DIRECT EXAMINATION

12 BY MS. BRANDT:

Q. Could you please state your name for the record.

My name is William E. Karo Johnson.

15 Q Mr. Johnson, do you recognize the person who is
16 seated to my left, your right?

17 A I do.

12 Q. And how do you know him?

I represented him in his capital murder trial.

... Show. And do you recall --

— Who are you talking about, Wesley Ruiz?

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24 Q And do you recall the date that you were appointed
25 to come into the case?

1 A NO.

2 MS. BRANDT: Your Honor may I approach?

3 THE COURT: You may.

4 Q. (By Ms. Brandt) Let me show you what has been
5 admitted into evidence as Exhibit 1-D.

6 A Okay.

7 Q And can you, based on those records, could you
8 tell me when you were first appointed to represent Mr. Ruiz?

9 A June 7th 2008.

10 Q Well, was it 2008 or 2007, if you take a look at
11 the sheets following?

12 A 2007.

13 Q So that was a typographical error?

14 A It was.

15 Q Were you present in the courtroom during the
16 guilt/innocence phase?

17 A Yes, I was.

18 Q And were you present in the courtroom during the
19 punishment phase?

20 A Yes, ma'am.

21 Q And do you recall the presence of law enforcement
22 in the courtroom?

23 A Can you be a little more specific about that.

24 Q Well, do you know what law enforcement is?

25 A I'm sorry?

1 Q Law enforcement, Dallas Police Officers, were they
2 present in the courtroom?

3 A During what period?

4 Q The guilt/innocence phase?

5 A Well, they were in here testifying.

6 Q Okay. Did you see law enforcement officers in the
7 courtroom as spectators, not as security?

8 A Yes.

9 Q Okay. And where did you see them?

10 A When?

11 Q Where, where in the location in the --

12 A Well, there were law enforcement individuals that
13 weren't spectators, that were the bailiffs assigned to the.
14 There were also --

15 Q How many bailiffs were there?

16 A It varied. Most of the time there were anywhere
17 from three to five in the courtroom at any one time.

18 Q And were they identified by uniform?

19 A Some of them.

20 Q Okay. And what other law enforcement was in the
21 courtroom during the guilt/innocence phase besides the
22 bailiff?

23 A Well, there were the witnesses.

24 Q And besides the witnesses, were there law
25 enforcement that were spectators?

1 A Occasionally.

2 Q I'm sorry?

3 A Occasionally.

4 Q And on any given day, during the guilt/innocence
5 phase, what was the total number of law enforcement that was
6 present that wasn't a bailiff participating in the trial or
7 an officer there for security purposes?

8 A I don't know.

9 Q Would you say more than five?

10 A Depends on the day, I mean, it varied. There were
11 different amounts of people in here, different days, this
12 trial went on for weeks.

13 Q What is the fewest number of spectators for law
14 enforcement?

15 A I have no idea. That was not something I was
16 concentrating on. We made a record about the fact we
17 thought it should be limited. But we were kind of
18 concentrating on things, our concentration was else where.

19 Q And what about punishment phase, do you recall how
20 many?

21 A Specific numbers, no. But, yes, there were -- and
22 truthfully there were a lot more in here during final
23 argument on each phase of the trial than there were during
24 the testimony.

25 Q And when they were here, what was their purpose

1 for being here for final argument?

2 A You would have to ask them.

3 Q What do you think, what do you perceive their
4 purpose for being here, were they trying to send a message
5 to the jury?

6 A I have no idea. I am not going to speculate on
7 that.

8 Q Okay. It thank you.

9 If there is physical evidence that needs to be
10 obtained, how does the Defense go about getting that, what
11 is the procedure?

12 A You talking about physical evidence in the --

13 Q In this particular case?

14 A Are you talking about physical evidence that is in
15 the care, custody, control of the State?

16 Q Physical evidence that is in the care, custody,
17 control say for example law enforcement, how would you go
18 about getting that?

19 A Generally we know what it is, and we have the
20 opportunity to inspect it. You are going to have to give me
21 something more specific what you are talking about, that is
22 too general of a question.

23 Q There was an issue with respect to missing
24 audiotape; is that correct?

25 A Correct.

1 Q And normally how would you go about getting access
2 to the original source of the audio recordings? Can you
3 just walk into the department or do you have to go to the
4 D.A. and go through them to get it, or what is the
5 procedure?

6 A You talking about specifically in this case?

7 Q Specifically in this case.

8 A Well, generally if -- my recollection is this, we
9 requested the audiotapes that they had and we got it.

10 Q When did you request it?

11 A I don't know specific dates.

12 Q Okay, 2008?

13 A Again, I don't know specific dates. But --

14 Q Did you request it in writing?

15 A I believe we did.

16 Q Okay.

17 A And we were provided what they had. Obviously,
18 you are aware that, I am assuming you have read the
19 transcript, we had some hearings on the fact that we thought
20 there should have been more available to us. That we were
21 told that it was not available, that it was erased.

22 Q Okay.

23 A Okay.

24 Q And what -- if anything had been done to preserve
25 that original source?

1 A I don't understand your question.

2 Q Had any member of the defense team gone to the
3 Judge announced for an order to have access to that
4 information at the inception of the case?

5 A Well, I didn't get on the case at the very
6 beginning.

7 Q So the answer is you really don't know?

8 A I have already said that. But I can try to
9 complete my answer, if you like.

10 Q Okay, go ahead.

11 A I believe that there were -- we actually made an
12 issue of the fact that we did not get recordings that should
13 have been preserved.

14 Q And that was in 2008 when y'all had the hearing?

15 A Yes.

16 Q Okay. Did -- who was responsible for the jury
17 instructions?

18 A The Court.

19 Q No. Among the defense team when they look over
20 the jury instructions before they are submitted to the jury,
21 usually the defense attorneys go over them and make
22 objections or request additional instructions, was any
23 individual on the team a point person for dealing with the
24 jury instructions?

25 A We all looked at it, we all had suggestions, we

1 all talked about it.

2 Q And y'all were aware that the audiotape portions
3 were missing?

4 A Some of it.

5 Q And that disadvantaged the Defense?

6 A Well, I don't know what was on there, so I
7 couldn't say it was a disadvantage or advantage to us.

8 Q But if it was something that could have been
9 helpful, that's the reason why you needed to find out and do
10 the due diligence, that's the reason why you had the
11 hearing?

12 A Sure.

13 Q Did anybody request exfoliation?

14 MS. SHIN: Objection, Your Honor, that goes
15 outside the scope of the hearing.

16 MS. BRANDT: No, this is not outside the scope of
17 the hearing, it goes directly back to the audiotape.

18 MS. SHIN: That was raised in the subsequent
19 application and you never objected to that.

20 MS. BRANDT: And the Judge ruled that the
21 supplement that I made in the state habeas petition
22 with respect to exfoliation argument was part of the
23 original state habeas.

24 MS. SHIN: Regardless that issue was not
25 designated for issues of this hearing.

1 MS. BRANDT: If it is part of the ineffective
2 assistance counsel claim, it goes back to the to the
3 audio tapes.

4 MS. SHIN: Judge, would you like to see a copy of
5 the O.D.I.?

6 THE COURT: Yes.

7 MS. BRANDT: I didn't sign the O.D.I.

8 MS. SHIN: The Judge did.

9 MS. BRANDT: I never had any input on that O.D.I.

10 MS. SHIN: You were served with it.

11 THE COURT: The Court sustains the objection.

12 MS. BRANDT: I'm sorry?

13 THE COURT: Sustains the objection.

14 MS. BRANDT: I have no further questions of this
15 witness?

16 MS. SHIN: I don't have any questions, either.

17 MS. BRANDT: You are dismissed.

18 THE WITNESS: Thank you, Your Honor. Am I
19 excused?

20 THE COURT: You are.

21 MS. BRANDT: We call Doug Parks, please.

22 (Witness entered the courtroom.)

23 THE COURT: And you may proceed.

24

25

DOUGLAS PARKS

2 was called as a witness, and having been duly sworn by the
3 Court, testified under oath as follows:

DIRECT EXAMINATION

5 BY MS. BRANDT:

6 Q Good afternoon. Could you state your name for the
7 record, please.

8 A Douglas Parks.

9 Q And do you know the gentleman who is sitting to my
10 left, your right?

11 A I do.

12 Q And who is he, please?

13 A Wesley Ruiz

Q. And how do you know Mr. Ruiz?

represented Mr. Ruiz on his direct appeal.

Q. Were you involved at all in the trial proceedings?

13 To some extent

18 Q And can you tell me what the extent of your
19 involvement was?

20 A Not specifically, I sat in on the trial, I
21 consulted with the trial attorneys. And if I recall
22 correctly, I might have even cross examined a witness or
23 two. I really don't remember for sure about that. I think
24 I had some minor participation in the trial itself above
25 just advising trial counsel.

*Belinda G. Baraka, Official Court Reporter
214-653-5803*

1 Q And do you recall the date on which you were
2 first -- came into the case, you were first appointed?

3 A No.

4 MS. BRANDT: Your Honor may I approach?

5 THE COURT: You may.

6 Q. (By Ms. Brandt) Mr. Parks, let me show you a copy
7 of your billing records. These have already been admitted
8 into evidence by mutual agreement by both parties. And this
9 is Exhibit 1-E. And let me see if this helps to refresh
10 your recollection as to when you came into the case?

11 A Well, normally the front page of that says
12 appointment date, but I didn't have that on there.

13 Q How about if you take a look at the time and task
14 you submitted, would that be close enough?

15 A It appears May 27, '08 would have been the
16 first -- no, that is not right either -- well, maybe it is
17 right, May 27, '08. Uh-huh, I guess that's right.

18 Q May 27, '08?

19 A Appears so.

20 Q We have a stipulation what appears in the record.
21 So that purports to what your recollection is?

22 A Yes, that would normally be. Typically on an
23 appeal appointment, I wouldn't have come into the case
24 necessarily until after the case was completely over. But I
25 know that I came in essentially when testimony began.

1 Q The testimony in punishment?

2 A Is my recollection.

3 Q In punishment or guilt/innocence?

4 A No, in guilt/innocence.

5 Q Guilt/innocence. Do you recall when the offense
6 was?

7 A Not off the top of my head.

8 Q How about March 23rd, 2007, would that --

9 A Sounds about right.

10 Q And that again is also part of the stipulation of
11 facts as to what the record shows, which is Exhibit 2, that
12 has been admitted. Tell me a little bit about your
13 background as a criminal defense lawyer, how long have you
14 been doing criminal defense?

15 A Actively since 1972. I have been board certified
16 in criminal law since 1977 or '78, I can't recall. And I
17 have devoted my practice completely to criminal defense law
18 for the past probably 15 to 20 years.

19 Q And do you do a substantial amount of capital
20 defense work?

21 A That is about chiefly what I do.

22 Q And about how many capital defense cases you have
23 been in?

24 A Where the State sought death or capital murder
25 cases?

1 Q Where the State sought death?

2 A On a trial basis only, somewhere between 15 and
3 20, and I haven't counted recently.

4 Q And how about for appeal?

5 A Roughly ten, I guess, on direct appeal.

6 Q And how about capital cases that are cap cases but
7 weren't seeking death?

8 A Probably 50 to 75.

9 Q Let's talk a little bit about your background, are
10 you on any particular committee with respect to
11 death-penalty cases?

12 A I'm the defense lawyer appointed to the capital --
13 and I ought to be embarrass that I don't know the official
14 name of it, it is the committee that is constituted in each
15 administrative district for the approval of capital counsel
16 and I am the defense lawyer in this district and have been
17 since the formation of that committee.

18 Q And about when was that?

19 A Ten years ago.

20 Q Okay. So we are looking --

21 A I know Pat McDowell was the Administrative Judge
22 at the time.

23 Q So this goes back to the year 2000 or so?

24 A Approximately.

25 Q And so whoever gets on to the appointment list,

1 they have to come by your committee before they can be
2 approved to be on that appointment?

3 A That's right. We approve everybody from here
4 north to Oklahoma and Louisiana and down south a ways. I
5 think there are five districts in the State of Texas. That
6 committee is myself, Judge Ovard, Kerry Young, and I think
7 Judge Tinsley at present, the sitting Dallas judge rotates a
8 little bit, but I think Judge Tinsley is still on the
9 committee.

10 Q And have you been recognized by the capital
11 education group and invited to speak at seminars?

12 A I have been on faculty for several seminars out at
13 the Center for Irving and International Law Camp in Plano.
14 I have spoken on chiefly capital jury selection. Most
15 recently about two weeks ago I helped present a program on
16 the trial of older cases that have come back for either
17 resentencing or new trials, since I have done a few of
18 those.

19 Q So you are well recognized in the capital defense
20 community?

21 A I think so.

22 Q Okay. Are you familiar with the guidelines and
23 standards for Texas Capital Counsel?

24 A I have read them, I think I understand them pretty
25 well. I probably couldn't quote from them.

1 Q Okay. And are you familiar with the guidelines
2 and standards for Texas Capital Counsel that specifically
3 was adopted by the state bar, April 21 of 2006?

4 A And again, Ms. Brandt, I have read them, but I
5 couldn't quote from them.

6 Q These are the standard of care that would have
7 governed in the -- for the defense lawyers in Mr. Ruiz's
8 case; isn't that true?

9 A I think that's true.

10 Q Okay. And so defense counsel is being told in
11 these guidelines what it is they should or shouldn't be
12 doing; is that correct?

13 A Certainly those are very strong suggestions.

14 Q Yeah. And so they become a measure of whether or
15 not someone has either performed effectively or performed
16 efficiently?

17 A Well, again, they are not statutory. It is not
18 law, as far as I understand, I may be wrong about that. It
19 is just guidelines of the state bar or the ABA and the
20 mitigation standards suggests for capital cases. And I know
21 that courts in dealing with ineffective assistance of
22 counsel issues look to those guidelines as an aid in
23 determining whether or not a person is acting effectively.

24 Q And in fact one of those courts that have looked
25 at these guidelines in making these kinds of determinations

1 as to the standard of care that defense counsel is supposed
2 to use is the United States Supreme Court; isn't that true?

3 A Yes.

4 Q And they specifically used it in the Wiggins case,
5 among others, that is not the only one?

6 A Yeah.

7 Q Let me ask you a question just generally, because
8 you have done this work for such a long time, when there is
9 physical evidence in a case, generally how does Defense
10 Counsel go about getting ahold of that physical evidence?
11 Let's just say it is in the hands of law enforcement, do you
12 as the criminal defense lawyer have to go to the prosecutors
13 and ask them for permission and get it through them?

14 A Well, you can do it in different ways. Usually at
15 least in Dallas County and in the counties in East Texas
16 where I practice, it is done on an informal basis,
17 essentially, ask the prosecutor whether, you know when would
18 be a convenient time to view all of the evidence. If it is
19 evidence that is not going to be handed over to you, if it
20 is evidence that is going to be admitted in the trial, then
21 that's going to be kept in a central location and you are
22 allowed to view it, photograph it, test it, if it is stuff
23 that needs to be tested. And that generally is done
24 informally. If you can't reach an agreement with the
25 prosecutor or if you have a dispute about some particular

1 piece of evidence, you go to the Court, file a motion and
2 ask the Court to order that you be allowed to have
3 possession of it, use it, photograph it, or do whatever it
4 is that you want to do.

5 Q And are you aware when the guidelines talk about
6 when -- when do you first go out and start trying to obtain
7 or preserve that evidence?

8 A Well, generally you try to do that at the earliest
9 opportunity that you have.

10 Q So that would be at the inception of your
11 appointment?

12 A Well, that would certainly be a good standard to
13 use. It is not always practically something that can be
14 done.

15 Q All right. Let me ask you a question, is it
16 standard knowledge here in Dallas County among both the
17 defense, criminal defense bar and the prosecutors, that the
18 communications between and among different law enforcements
19 are recorded?

20 A Let me make sure I understand what you are asking,
21 communications between law enforcement.

22 Q Yes. For example in Mr. Ruiz's case specifically,
23 there was a chase going on and the officers were
24 communicating with each other. They were communicating with
25 the dispatchers, all of that information would have been

1 recorded on various channels and put on to the city server;
2 is that correct?

3 A In best of all worlds, yes, that's correct.

4 Q And that is pretty common knowledge that those
5 communications are recorded?

6 A Well --

7 Q Certainly --

8 A Knowledge might not be the word I use, I would use
9 there. I think it is fairly commonly supposed that that is
10 true.

11 Q Okay. So that would put a defense lawyer on
12 notice that he would need to go look for that kind of
13 physical evidence at the inception of the case?

14 A I know what you are getting at, Ms. Brandt, I have
15 read the petition. It would certainly put an attorney on
16 notice that that sort of evidence may well exist and might
17 well be important and useful in the case.

18 Q Okay. And if it is important in the case, it is
19 true that an attorney would take steps to, at a minimum,
20 obtain or preserve that information?

21 A Not necessarily.

22 Q Let me show you the guidelines, you said you
23 haven't --

24 A I haven't read them in a while. I don't doubt
25 that it is said that that is something you ought to do.

1 Q I'm sorry, I didn't catch the last part.

2 A I said I don't doubt it said that that is
3 something that counsel ought to do.

4 Q Okay. Let's take a look at these guidelines. And
5 specifically I would like to direct you to guideline 11.1,
6 trial investigation?

7 A I'm sorry, which one?

8 Q 11.1.

9 A Oh, yeah, I got it. I just didn't hear you.

10 Q And if you take a look at guideline 1.1-A 2-A and
11 B?

12 A Two A and B?

13 Q Two B. So it is guideline 11.1-A then we go down
14 to 2 and then we drop down to B. And just so we can put on
15 the record that we are in agreement as to what it is that we
16 are looking at, it says here that informal discovery
17 request, and this includes physical evidence --

18 A Uh-huh.

19 Q -- should be immediately made to law enforcement
20 and the District Attorney; would you agree that that's what
21 that says?

22 A Yeah, that's what it says.

23 Q And what is immediately?

24 A I guess it is immediately. I mean you need to
25 know who to talk to.

1 Q . Let's take a look at Webster's dictionary, it
2 defines the term immediately --

3 A Ms. Brandt, I understand what the word immediately
4 mean. It means do it as quickly as possible.

5 Q Well, without delay, at once, or instantly; would
6 you agree with that?

7 A Fine.

8 Q Okay. And when the -- the evidence is in the
9 hands of law enforcement, that evidence is accessible to
10 prosecution where they could go to law enforcement to obtain
11 access to that evidence; isn't that true?

12 A True.

13 Q And the Defense could also obtain access to that
14 evidence; isn't that true?

15 A Not as easily as the State could.

16 Q But they could --

17 A They could.

18 Q They can if they take steps.

19 A Or at least keep it preserved if they can't get
20 their hands on it.

21 Q Okay. And so under this guideline when there is
22 access to evidence by the Defense, the standard of care is
23 saying that, quote, informal discovery requests, before
24 indictment, if possible, should be immediately made to law
25 enforcement?

1 A That's what it says.

2 Q Okay. Do you know the date of the offense in this
3 case?

4 A No. You told it to me a while ago, but I don't
5 remember.

6 Q March 23rd, 2007?

7 A Okay.

8 Q And do you know when Mr. Brauchle was appointed?

9 A I have no idea.

10 Q Let me show you this for the record, please. You
11 do appellate work from what you said, can you tell me what
12 this thing is that you are looking at?

13 A Looks like the clerk's record to me.

14 Q And what does the clerk's record contain?

15 A All of the written documents in the case, motions,
16 indictments, stuff like that.

17 Q And this is the clerk's record volume one for
18 Mr. Ruiz in particular?

19 A Yes.

20 Q And let me show you in particular what page is
21 that?

22 A That's the docket sheet.

23 Q And what page is it for the record purposes?

24 A It has been marked on, looks like it might be '08.

25 Q And does that look like Mr. Brauchle was appointed

1 on March 27 of '07?

2 A Looks like 29.

3 Q I'm sorry, March 29 of 2007?

4 A Yes.

5 Q So he was in the case six days after the offense
6 occurred?

7 A Appears so.

8 Q Okay. Is it common knowledge that audio
9 recordings are routinely destroyed after 30 days?

10 A I don't think so.

11 Q Let me show you a motion that was filed in this
12 particular case. If you could identify what that motion is,
13 please.

14 A Motion to Dismiss or Preclude Imposition of Death
15 Penalty for Failure to Preserve Evidence.

16 Q And can you tell me who signed that motion?

17 A Looks like Paul Brauchle and Karo Johnson.

18 Q And if you look on paragraph two, this is a
19 writing that Mr. Brauchle did, and if you look down here on
20 the one, two, three four, the fifth line of Roman Numeral
21 Two, what does that say?

22 A Said recordings are routinely erased after 30
23 days.

24 Q So it appears from that document that he knew that
25 recordings were routinely erased after 30 days?

1 A I would assume so.

2 Q And to the best of your knowledge, and I know you
3 came in later in the case, do you know whether or not
4 Mr. Brauchle made any request to either obtain or preserve
5 the audio recordings in the first 30 days?

6 A I don't know.

7 Q Okay. Let me again approach you.

8 MS. BRANDT: If I may, Your Honor?

9 THE COURT: You may.

10 Q. (By Ms. Brandt) Again, this is the clerk's record
11 that we were just looking at. And could you read this for
12 us, what it says at the top?

13 A Motion for Discovery and Inspection of Evidence
14 Number One.

15 Q So it is number one. And this is a request for
16 discovery, like audio for example, because that would be
17 physical evidence, and it does say number one. Could you
18 tell me if you looked through this, this begins on what
19 page?

20 A Sixty-two.

21 Q And at the end, could you flip to the end of this
22 document, please.

23 A (Witness complies.)

24 Q And who has signed this document?

25 A Brauchle and Karo Johnson.

1 Q And what is the date of the document?

2 A Well, date of service says -- certificate of
3 service says it was served on December 7th, 2007.

4 Q That was eight months after the offense date,
5 which was March 23rd of 2007; is that correct?

6 A Yes.

7 Q That would not be immediately, would you agree
8 with that?

9 A That's right.

10 Q And so that would not concord with the guidelines
11 set out in 11.1?

12 A That's right.

13 Q Let me ask you another question, you are an
14 experienced appellate attorney?

15 A I do appellate work, yes.

16 Q And so you know how important it is to preserve
17 the record?

18 A Yes.

19 Q Tell me when someone makes an objection, what are
20 the steps that are required to preserve error, what does a
21 defense attorney have to do?

22 A Keep asking for relieve until you are denied.

23 Q Okay. But how do they go about doing that?

24 A Particularly making an objection, if the Court
25 sustains your objection, you ask that the jury be instructed

1 to disregard whatever it was that was offensive; and if the
2 Judge grants that and instructs the jury, then you ask for a
3 mistrial.

4 Q Okay. When you talk about objection, they stand
5 up and they say, I object, is that sufficient?

6 A No. Generally speaking, no. Not unless it is
7 absolutely a perfectly obvious what the objection would be.

8 Q And so what more is necessary besides saying, I
9 object?

10 A The objection must be specifically enough
11 identified that the Court can know what it is that you are
12 really objecting about.

13 Q Okay. So we need to put the Court on notice?

14 A Sure.

15 Q And that gives the trial judge an opportunity to
16 correct --

17 A Make a ruling.

18 Q -- to make a ruling. If for example we have an
19 objection that just says, Objection, Your Honor, we object
20 to the increased deputies in the courtroom, what is the
21 problem with that objection for if appellate court is
22 looking at it, what more did the trial lawyer need to do?

23 A Well, it would be preferable as a lawyer to state
24 specifically what the objection was and federalize it by
25 stating what constitutional amendment prohibited whatever

1 that was if it did or what statute or rule prohibited the
2 activity that they were objecting about in a perfect world.

3 Q What is the reason for stating a federal
4 constitutional law basis for that objection?

5 A Something that can be raised in federal court in a
6 federal writ and not defaulted in state court.

7 Q Okay. And so essentially a trial counsel didn't
8 say, Your Honor, I object based on whatever the federal
9 constitutional grounds is, essentially that error is going
10 to be waived forever and ever?

11 A In federal court.

12 Q And the federal court will never get to the merits
13 or review that claim?

14 A That's right.

15 Q Even if it is a perfectly, legitimate meritorious
16 claim?

17 A That's right.

18 Q Even if it was a claim that had it been preserved,
19 he could have gotten relief and maybe the death penalty
20 would have been reversed?

21 A That's right.

22 Q This also is from guideline for 11.2, can you tell
23 me what this is?

24 A I can tell you what it says.

25 THE COURT: Court has a copy.

1 MS. BRANDT: You do have a copy, thank you.

2 A Guideline 11.2, duty to assert legal claims.

3 Q (By Ms. Brandt) And in there, this is again a
4 standard of care that is applicable to defense counsel in
5 capital cases?

6 A Is this state guidelines?

7 Q I'm sorry?

8 A Are these state bar guidelines or ABA.

9 Q Let me give you the full --

10 A I'm fine.

11 Q So you got a complete copy of the entire Texas
12 guideline so you can see what I am looking at. That way I
13 am not springing it on you. This is from the guidelines for
14 standards of Texas Capital Chemical and this is the page
15 that you got?

16 A I just wanted to know which one it was.

17 Q Okay. What I am asking you, is this is the
18 standard of care that is applied to Defense Counsel in
19 capital cases; is that correct?

20 A According to the Texas guidelines.

21 Q Okay. And the Texas guidelines were adopted
22 April 21 of 2006; is that correct?

23 A Sounds right.

24 Q And so this guideline would have been applicable
25 to Mr. Ruiz's case?

1 A Yes.

2 Q And if Defense Counsel failed to properly object,
3 then their performance would have been deficient under this
4 guideline?

5 A I am not -- I am having trouble with the word
6 deficient under the guidelines. It would not have been in
7 accordance with guidelines.

8 Q These are the same guidelines under this 11.2 to
9 assert legal claim. This is a mirror image of the ABA
10 guidelines.

11 A Okay.

12 Q And those are the guidelines approved by the U.S.
13 Supreme Court?

14 A That's right.

15 Q And this is the standard for performance that
16 measures counsel's performance in capital cases?

17 A As a guideline.

18 Q Okay. You said you were present during the guilt
19 phase?

20 A Yes.

21 Q Okay. Do you recall the presence of law
22 enforcement in the courtroom?

23 A Yes.

24 Q And I am talking about spectator law enforcement?

25 A Yes.

1 Q Not security?

2 A Yeah.

3 Q During the course of the guilt/innocence phase,
4 what was the greatest number of spectator law enforcement
5 that you recall?

6 A I didn't count them.

7 Q More than five?

8 A Oh, yeah.

9 Q More than ten?

10 A You mean at any time, the maximum number?

11 Q The maximum at any time?

12 A I would say more than ten, probably more than 20.

13 Q Maybe more than 30?

14 A My recollection is there were a lot more at
15 punishment than at guilt/innocence, so I am not real sure.

16 Q Let's talk about the timing of when those
17 individuals were in the courtroom. Were there more police
18 present during say for example the closing argument?

19 A Sure, that's when they mostly all came in for
20 final argument.

21 Q And what is the point for coming in for final
22 argument, are they sending a message to the jury?

23 MS. SHIN: Objection to speculation.

24 Q (By Ms. Brandt) In your opinion, Mr. Parks?

25 A In my experience and I have tried more capital

1 murder cases with dead police officers than I would like to
2 say, particularly since my niece just passed her sergeant's
3 exam today. I have a great deal of respect for police
4 officers. But in my experience, they do that to show both
5 solidarity with the family of the deceased and to be a
6 presence for the jury to see and feel.

7 Q (By Ms. Brandt) So essentially they are trying to
8 influence -- their presence, just the fact of their
9 presence, if they do nothing else, the fact of their
10 presence is something that they are doing to influence the
11 outcome of the case?

12 A Sure. And that's why our courts have indicated
13 that it is inappropriate.

14 Q Okay. And in this case based on your observation
15 in guilt/innocence and the number of police officers that
16 were there in closing argument, did it appear that they were
17 there to influence the outcome of the case?

18 A That would have been my judgment of the matter.

19 Q Okay. And in fact the jury did come back with a
20 verdict of guilty of capital murder --

21 A Yes.

22 Q -- for Mr. Ruiz. Let's talk about the punishment
23 phase now, how many individual, police officers, that were
24 not security at on any one day were present during
25 punishment?

1 A Ms. Brandt, I don't know.

2 Q Well, let's go back to where we were before. You
3 said that you thought there were how many in
4 guilt/innocence, about 30?

5 A No, I don't think there was as many as 30, if I
6 did --

7 Q More than 20?

8 A More than 20, more than 20. But I don't think
9 that is true of everyday.

10 Q But that was the maximum?

11 A Maybe as many of that when guilt/innocence was
12 argued, that would have been when most of them was here.

13 Q And that was the most crucial time to have all
14 those people present?

15 A Sure.

16 Q You said, if I understood you correctly, you said
17 you thought there was even more police who were present
18 during the punishment phase; isn't that true?

19 A I believe so.

20 Q If the number of police officers in the courtroom
21 in the closing arguments were more than 20, less than 30,
22 what is your best estimate as far as the number of police
23 officers at closing argument in the punishment phase, was it
24 more than 30?

25 A I would say probably more than 30.

1 Q More than 40?

2 A I don't think so.

3 Q So it was more than 30, go ahead?

4 A I would say probably more than 30, maybe less than
5 40. That sure seems like a lot.

6 Q But the courtroom was packed?

7 A It was pretty full.

8 Q Yeah. And do you recall any law enforcement who
9 was standing along the wall?

10 A Not specifically, but there may have been.

11 Q Okay. And so they could have been standing along
12 this right side wall?

13 A Seems like I remember there were some standing up,
14 maybe six or eight.

15 Q Six or eight along the right wall over here to
16 your right wall?

17 A That's kind of my recollection.

18 Q How about was there any standing in the back?

19 A May have been. Beer in mind, Ms. Brandt, my back
20 is to all of that when I am sitting forward. So I don't
21 know.

22 Q But it certainly made enough of a clear impression
23 on you that you certainly have the perception that the
24 courtroom was packed with law enforcement?

25 A Well, we saw them coming in and going out.

1 Q And again, your -- based on your experience as a
2 very experienced criminal defense lawyer, trying cases where
3 police officers have been murdered, in this particular case,
4 the Ruiz case, the law enforcement was there in closing
5 argument for the punishment phase again to send a message?

6 A That's part of why they are here, I believe, yes.

7 Q Okay.

8 MS. BRANDT: I have no further questions.

9 CROSS-EXAMINATION

10 BY MS. SHIN:

11 Q Hi, Mr. Parks. My name is Grace Shin. We have
12 met before?

13 A I know you, Grace, yes.

14 Q I just have a few questions for you. Would you
15 agree that a defendant in a death-penalty trial requires an
16 enormous amount of work?

17 A Absolutely. I have one starting Monday, and I am
18 watching the clock tick.

19 Q And the pretrial phase could take months; is that
20 correct?

21 A Yes.

22 Q And the trial could take one to two weeks?

23 A Yeah.

24 Q With the respect to the guidelines that Ms. Brandt
25 brought up, a violation of one of those guidelines wouldn't

1 necessarily lead to a conclusion that counsel was
2 constitutionally ineffective, would it?

3 A I don't believe so.

4 Q With respect to the issue of the officers in the
5 courtroom, in your professional opinion, do you think the
6 jury would have assessed a life sentence if there were fewer
7 jurors in the courtroom?

8 A I am not going to speculate on that, I don't know.

9 Q That's fair?

10 MS. SHIN: Those are all my questions.

11 MS. BRANDT: I have no further questions.

12 Your Honor, is he excused?

13 THE COURT: Any objections?

14 MS. SHIN: No objections from the State.

15 THE COURT: You are excused.

16 MS. BRANDT: Judge, are we going to reconvene
17 tomorrow? I think I only have Cliff is all that is
18 left.

19 THE COURT: We will recess and start at 9:00 a.m.
20 tomorrow.

21 (Court recessed for the day.)

22

23

24

25

1 THE STATE of TEXAS)

2 COUNTY of DALLAS)

3 I, BELINDA G. BARAKA, Official Court Reporter in
4 and for the 194th Judicial District Court of Dallas County,
5 State of Texas, do hereby certify that the foregoing
6 contains a true and accurate transcription of all portions
7 of evidence and other proceedings requested in writing by
8 counsel for the parties, to be included in this volume of
9 the Reporter's Record, in the above-styled and -numbered
10 cause(s), all of which occurred in open court or in chambers
11 and were reported by me.

12 I further certify that this Reporter's Record of
13 the proceedings truly and correctly reflects the exhibits,
14 if any, admitted by the respective parties.

15 I further certify that the total cost for the
16 preparation of this Reporter's Record was paid by the
17 State.

18 WITNESS MY OFFICIAL HAND this the 23rd day of
19 October, A.D., 2011.

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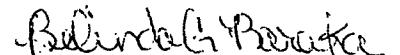
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\s\Belinda G. Baraka

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